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UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

INTER CITY TIRE AND AUTO .
CENTER, INC., et al., .
Plaintiffs, .
Case No. 2:13-cv-02590
vs. .
Newark, New Jersey
MICHELIN NORTH AMERICA, .
INC., et al., .
January 16, 2015
Defendants. .
.

TRANSCRIPT OF HEARING
BY THE HONORABLE MICHAEL A. HAMMER
UNITED STATES MAGISTRATE JUDGE

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1 (Commencement of Proceedings at 10:21:42 a.m.)

2 THE COURT: All right. This is the matter of
3 Michelin North America, et al., versus Inter City Tire as well
4 as Intercity Tire versus Michelin North America. The docket
5 number in this matter is civil number 13-2590. We're
6 continuing the hearing from Tuesday with respect to the
7 subpoena issues. Can I have appearances, please, starting with
8 plaintiff.

9 MR. CONNOLLY: Michael Connolly, co-counsel for Inter
10 City Tire, Your Honor.

11 MR. BROSNICK: Richard Brosnick from Akerman LLP for
12 Somet, non-party Somet Truck Center.

13 THE COURT: All right. And then who do we have on
14 the telephone please?

15 MS. FENNELLY: Good morning, Your Honor. Kathleen
16 Fennelly from Graham Curtin on behalf of Michelin.

17 MR. LASALA: Good morning, Your Honor. Joseph Lasala
18 of McElroy, Deutsch for Inter City.

19 MR. HERZOG: Peter Herzog, Your Honor on behalf of
20 Michelin North America.

21 MR. TIPTON: Brian Tipton on behalf of Service Tire
22 Truck Centers.

23 THE COURT: Is that everybody? All right. Do I have
24 counsel on for Michelin?

25 MS. FENNELLY: Yes, Your Honor.

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1 MR. HERZOG: Yes.

2 THE COURT: All right. I just wanted to make sure.
3 All right. Let me start with the application that was filed
4 last night by Michelin and Service Tire Truck Center for a stay
5 pending the motion in South Carolina for a protective order.
6 Mr. Connolly I assume you want to address that?

7 MR. CONNOLLY: Your Honor, I received that this
8 morning. I was only able to read it over the phone. So I'm
9 afraid that I may not have gotten all of the, all of the
10 papers.

11 But as the Court ruled earlier this week the
12 discovery served in this case was all timely served. The only
13 reason that we are pursuing this outside of the discovery
14 period set by the court in South Carolina is the third party
15 has exercised its rights to object to the discovery.

16 So Inter City is not seeking discovery outside of the
17 discovery period. And as I mentioned to the Court, myself and
18 attorney Celeste Jones, who was on the call earlier in the
19 week, Judge Herlong has already denied a motion for a
20 protective order filed by other third parties seeking to defeat
21 discovery that was exactly the same as this. Discovery that
22 was propounded within the discovery period but those parties
23 filed objections and motions to quash and so forth. And Judge
24 Herlong in effect allowed that third party discovery to proceed
25 by denying immediately the motions for protective order filed

1 there.

2 THE COURT: Does anybody else want to be heard.
3 Obviously I already have them.

4 MR. BROSNICK: Your Honor, if I may.

5 THE COURT: Let me hear from Mr. Brosnick.

6 MR. BROSNICK: Before, obviously Michelin's counsel
7 will speak to the merits of their application, but as a non-
8 party already overburdened with expense in this matter to the
9 extent there is even a one percent chance that Judge Herlong
10 may not allow discovery to be used. The second to the last
11 thing I want to say to my client is you need to do more work
12 than you've already done and pay me more. The last thing I
13 want to say is you need to do it even though it may not be able
14 to be done, used at all.

15 So at the very least, and we're all here today, so I
16 have no objection, in fact I think I consent to continue with
17 Somet's motion to quash and try to resolve it on the merits.
18 But to the extent that it is going to be anything I
19 respectfully request to join Michelin and as to Service Tire's
20 request that it be stayed pending a ruling from South Carolina.

21 THE COURT: All right. And then lastly does Michelin
22 or Service Tire want to be heard?

23 MR. HERZOG: Yes, Your Honor. Michelin would ask to
24 be heard briefly. Responding to Mr. Connolly's points and just
25 to reiterate some of the points that we made on the record

1 during the last hearing, Your Honor, we basically agree
2 entirely that discovery sought by Inter City is timely.
3 Whereas I mentioned previously, Judge, there's a requirement
4 under the South Carolina rules that any discovery sought be
5 capable of being completed before the discovery cutoff.

6 We put in our papers information that indicated that
7 Inter City was aware of and in fact making allegations with
8 respect to the subject matters of their dispute or on which
9 they seek discovery at this late date as early as February of
10 2011. Two years before the discovery, the litigation in this
11 case was even commenced and even longer before the time period
12 for discovery in our case expired.

13 As I mentioned last time, under Rule 37 of the
14 Federal Rules of Civil Procedure specifically provide that a
15 motion for an order to a party must be made in the court where
16 the action is pending. A motion for an order to a non-party
17 must be made in the court where the discovery is or will be
18 taking.

19 And so we took the Court's suggestion, your
20 suggestion, Judge Hammer, and filed a joint motion asking Judge
21 Herlong to preclude any further discovery by a party, Inter
22 City in this case. The application that Mr. Connolly referred
23 to and that South Carolina counsel referred to when we were
24 last before the Court was an application by a non-party and the
25 judge has routinely denied those applications as having been

1 made in the wrong court.

2 We have now made an application. We believe that the
3 discovery sought is untimely. We believe that serving a notice
4 of deposition in seeking additional documents as of December
5 2nd, with a December 12th discovery cutoff, knowing all of this
6 information for years before that discovery was served, renders
7 that untimely.

8 We also believe, Judge, that with the pending trial
9 scheduled to begin February 2nd with the pretrial obligations
10 that are due between now and then, including meeting and
11 conferring, exchanging exhibits, motions for summary judgment,
12 motions in limine, and requests for jury instructions and the
13 like, that it severely prejudices our ability to get ready for
14 trial by conducting discovery that we didn't believe that can
15 be used because it is being pursued over our objection and
16 because it's untimely. And it interferes with out ability to
17 get ready for trial.

18 And so we would ask the Court, Judge Herlong is very
19 prompt in his rulings. Mr. Connolly and Mr. Lasala or their
20 South Carolina counsel can get an opposition to our motion for
21 protective order on file very quickly and the judge will rule
22 by text order. That's how he has done it.

23 And we think that this Court ought to wait for the
24 South Carolina court, which has jurisdiction over the trial, to
25 determine whether any further discovery outside of its deadline

1 should be allowed to occur, particularly because, as Somet's
2 counsel indicated, all of this effort and expense could be for
3 not if Judge Herlong decides that even after it goes forward
4 that it will not be allowed to be used. Thank you, Judge.

5 THE COURT: All right. Thank you. I have read the
6 arguments, much of which is essentially a rehash of what we
7 discussed on Tuesday. To be clear I never, certainly never
8 suggested that any party file this motion. It's up to counsel,
9 obviously, to do what they think is appropriate.

10 I've already rejected in fact on Tuesday, Michelin's
11 argument that the discovery couldn't have been produced within
12 the discovery cutoff and therefore was untimely. So I won't
13 dwell on that except to point out that at issue in part are
14 subpoenas that were served in October with compliance dates in
15 October. That, for example, would be the subpoena to Somet
16 with a return date of October 15th, well before the discovery
17 cutoff. At least some parts of which are very much in dispute
18 at this time.

19 That would also include the Chase subpoena and the
20 J.P. Morgan Chase subpoena, both of which were served in
21 November with a production date within the discovery cutoff
22 period. And the closest one really ends up being the 30(B)(6)
23 subpoena, because that subpoena was issued on December 2, 2014
24 with a compliance date of December 12, 2014. Of course
25 December 12th being the last day for fact discovery.

1 So that one does, is probably the closest example.
2 But even that allowed a ten day period for compliance and
3 wasn't a document production. It's a Rule 30(B)(6) deposition.
4 Now I'm certainly aware of the fact that Somet argues that, and
5 I think some of this is borne out by the subpoena which we'll
6 be addressing today, seeks such a broad array of topics that
7 certainly preparation that would have been I think difficult
8 given the, I think it was several dozen topics being sought by
9 way of that subpoena.

10 But I certainly can't find, and I already held this
11 on Tuesday, that those subpoenas seek discovery that could not
12 have been completed within the cutoff period. Certainly, and
13 this was I think further to my thought on Tuesday, I'm also
14 sensitive to Somet's argument that Judge, we shouldn't have to
15 produce this material if it's only going to be excluded later.
16 But as I concluded on Tuesday if it is the case that the
17 discovery could be produced within the discovery cutoff period,
18 I don't know exactly how much that argument flies.

19 Now obviously that's not an issue before me. That's
20 going to be an issue before Judge Herlong as the gatekeeper in
21 terms of evidence at trial being the trial judge. But that's
22 true of all discovery and all exhibits that the parties want to
23 seek to move into evidence.

24 So while I'm certainly sensitive to Somet's argument
25 the fact that we're doing this discovery now once the court

1 concludes that this discovery that was sought before the
2 discovery cutoff period and they can be reasonably produced
3 within the discovery cutoff period, I don't that qualitatively
4 that discovery then somehow ends up being more vulnerable to
5 exclusion than any other exhibits that were obtained through
6 the discovery process.

7 Ultimately in this court motions to stay are not
8 favored. A stay will not be granted absent a showing of good
9 cause because, and this is certainly true here, when discovery
10 is delayed or prolonged it can create case management problems
11 impeding the court's responsibility to expedite discovery and
12 cause unnecessary litigation expense and problem. See, Coca
13 Cola Bottling v. Grol., G-R-O-L, 1993 West law 13139559 at page
14 2, Eastern District of Pennsylvania, March 8, 1993.

15 The court therefore must find good cause in order to
16 issue a stay. That requires balancing the parties' interests,
17 the interest of the court, and the public's interest in a just,
18 speedy, and efficient resolution of the claim. See, In Re
19 Classic Added Antitrust Litigation (phonetic), 2004 West law
20 2743591 at page five, Eastern District of Pennsylvania,
21 November 29, 2004.

22 In order for this Court to stay the litigation it
23 would have to find that there is substantial merit to
24 Michelin's argument that ultimately the protective order will
25 be entered and should be entered by Judge Herlong. Obviously

1 that's entirely His Honor's decision and entirely His Honor's
2 decision as to what is allowed into evidence at trial.

3 But based on the record before me and having already
4 concluded that the discovery being sought here was timely
5 served in terms of the service of the subpoena, I cannot find
6 that there is substantial merit to Michelin's application.
7 Therefore I am going to respectfully deny the motion to stay
8 and we will proceed now to the subpoena issues.

9 Now, as I understand it counsel, we have before us
10 four subpoenas that are at issue in all or in part.

11 MR. BROSNIK: That's correct, Your Honor.

12 THE COURT: All right. Parenthetically by the way I
13 just realized that was actually the beginning of my decision on
14 the stay was actually quoting the Coca Cola Bottling v. Geol.
15 decision. If I didn't note that earlier that was actually a
16 direct quote.

17 All right. So if I understand correctly at issue at
18 this point are item two -- well lets deal first with the
19 subpoena that Inter City issued to Somet on October 8th,
20 returnable on October 15th. I just want to give an overview of
21 sort of what's at issue first. And then we'll come back to
22 each one and deal with it. All right.

23 So with respect to the subpoena that ICT issued to
24 Somet Tire returnable October 15th, what's still at issue,
25 well, when the parties first presented this dispute, item two

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1 was an issue, item 20R was an issue, item 20S was an issue, and
2 item 21 was an issue.

3 If I understand correctly two things have changed
4 since then. One is the cutoff date. It had said to the
5 present, but during the January 13th hearing I believe Inter
6 City agreed to limit the end date of that production to the end
7 of 2013. Is that correct?

8 MR. CONNOLLY: Earlier, Your Honor. April of 2013.

9 THE COURT: To April of 2013. Okay. The other thing
10 is if I recall correctly also items 20R and 20S, were those
11 withdrawn?

12 MR. CONNOLLY: Yes, Your Honor.

13 THE COURT: Okay. So those were withdrawn. So what
14 we have left from, was it April 1st, you said, 2013? Sorry.

15 MR. CONNOLLY: --

16 THE COURT: April?

17 MR. CONNOLLY: What if we make it the end of April?
18 The litigation was commenced in the middle part of that month.

19 THE COURT: I'm not sure Mr. Brosnick, that's going
20 to much affect Mr. Brosnick's position on the subpoena.

21 MR. BROSNICK: Your Honor, yeah. The difference
22 between, it's not irrelevant, but the difference between seven
23 years worth of records and eight plus years of records is
24 perhaps not a distinction.

25 THE COURT: Okay. So that's what's at issue at the,

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1 with respect to the October subpoena. With respect to the
2 30(B)(6) subpoena essentially the entirety of that is at issue
3 still. Right?

4 MR. BROSニック: Yes, Your Honor.

5 THE COURT: Okay. So we've really got our work cut
6 out for us on that. The other two are the subpoenas that Inter
7 City issued to Chase Bank, U.S.A., and J.P. Morgan Chase.
8 Those are at issue. Right?

9 MR. CONNOLLY: Yes, Your Honor.

10 THE COURT: Okay. Is there anything else at this
11 point that's in issue? Or is that -- that's a pretty full
12 plate but if there's anything else I'd rather know it now.

13 MR. BROSニック: I believe what Mr. Connolly's -- I
14 believe Somet fully complied with the first subpoena that was
15 issued on it and the second subpoena was issued improperly
16 through an affiliate. But there was no issue with cooperation
17 in working with counsel. Somet didn't object for the first
18 time until it received the third --

19 THE COURT: Yeah. Certainly nothing has been
20 presented to me that suggests that the first subpoena is at
21 issue. All right. So let's turn our attention to, you had
22 documents that you had given -- I need to take a two second
23 break. I just realized I left those in chambers. I'll be
24 right back.

25 (Brief pause.)

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1 THE COURT: The subpoena that was returnable on
2 October 15th, and I want to move this along folks. We've
3 already obviously dealt with a number of the issues. So, Mr.
4 Connolly, go ahead. You've got, you can take the lead on this
5 since you're looking to compel compliance. And I'm right,
6 we're down to item two, which is essentially the downstream
7 information, and item 21, which essentially is who owns what
8 when it comes to Somet Tire?

9 MR. CONNOLLY: Yeah. And as to that, Your Honor, I
10 think that's a pretty simple issue. We are interested in
11 knowing what Mr. Cohen's percentage ownership in Somet Tire is.
12 Mr. Cohen has submitted an affidavit to this Court indicating
13 that he is a principal of Somet Tire. I gather from that that
14 he's saying he's at least a part owner. And we simply seek to
15 know what his ownership interest is.

16 THE COURT: Tell me why. I mean why is that
17 relevant? How does that help you with trial?

18 MR. CONNOLLY: Well because Mr. Cohen is not just a
19 present principal of Somet Tire and has worked there since, as
20 he says in his affidavit, 2007. He's a former employee of
21 Inter City Tire. And in conjunction with his employment with
22 Inter City Tire during a period of time when Inter City --

23 THE COURT: And there was litigation about that.
24 Right? Previously?

25 MR. CONNOLLY: There was a violation of a non-compete

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1 agreement. Correct. When Mr. Cohen left, correct.

2 THE COURT: Okay.

3 MR. CONNOLLY: But the point that I wish to make is
4 that, and it really is -- well let me just say the fact that he
5 worked at Inter City Tire during a period of time when Inter
6 City was an authorized Michelin dealer and a retread franchisee
7 is important here because in his roll working at Inter City
8 Tire he became familiar with the Michelin policies and
9 procedures which are at the heart of the litigation between
10 Inter City and Michelin and Service Tire.

11 And so we believe that that is important contextual
12 information for the jury to hear in the South Carolina case.
13 We don't need to get elaborate documentation on his ownership
14 interest. In fact if Mr. Cohen is selected as the, or one of
15 the 30(B)(6) witnesses, if the Court permits that deposition to
16 proceed, we can simply inquire of him on the record what his
17 ownership interest is. And that would satisfy our interest.

18 THE COURT: And you actually anticipated one of my
19 questions. Has Mr. Cohen been deposed in this case?

20 MR. CONNOLLY: He has not.

21 THE COURT: He has not. Okay. All right.

22 MR. CONNOLLY: And I won't speak for Mr. Brosnick,
23 but Mr. Brosnick did suggest that he may be, if the Court
24 requires a 30(B)(6) deposition, he may be one of Somet's
25 designee if not it's only designee.

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1 MR. BROSNICK: Your Honor, just to speak to that.
2 One of the many aspects of burden on the 30(B)(6), I know I'm
3 jumping ahead.

4 THE COURT: Yeah. I don't want to jump ahead because
5 I get confused too easily.

6 MR. BROSNICK: The idea is there isn't really one
7 person, Somet doesn't have many employees, but the subpoena is
8 so broad that there isn't really any one employee who could
9 possibly speak to it all.

10 THE COURT: Okay. All right. So in other words it's
11 essentially contextual because you want to be able to argue I
12 guess at some point that Somet knew of these pricing strategies
13 because Cohen worked at Inter City and learned of these and
14 then essentially took that information with him to Somet?

15 MR. CONNOLLY: Correct.

16 THE COURT: And so the context is and he has an
17 interest in this because he has some ownership interest?

18 MR. CONNOLLY: Correct.

19 THE COURT: Okay. All right. Mr. Brosnick why isn't
20 that relevant?

21 MR. BROSNICK: I would say, well the extent to which
22 the fact that Mr. Cohen worked at Inter City a decade ago is
23 relevant as to what Michelin's policies were in 2003, '04, and
24 '05. That may or may not be relevant, but it's not what's at
25 issue.

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1 What's at issue is entirely separate from that which
2 is, is it relevant whether Mr. Cohen owns a tenth of a percent
3 or 50 percent, or 99 percent of Somet? And I would say that is
4 totally irrelevant. It's undisputed that he is a principal and
5 that he is an employee.

6 THE COURT: Well you just said whether he owns one
7 percent or 99 percent is totally relevant.

8 MR. BROSNICK: It's totally irrelevant. I-R-R-E-L --

9 THE COURT: Okay.

10 MR. BROSNICK: He is an employee of Somet. He was a
11 decade ago an employee of Inter City. That's undisputed. All
12 that's at issue here is whether the personal ownership stake of
13 a non-party who is not even subject to subpoena, could have
14 been subpoenaed and was not even subject to subpoena. But
15 there is personal information will be disclosed.

16 And I would say if the point is to show some kind of
17 a bias at trial, then the fact that he works for Somet, even if
18 he was just lets say an officer -- that alone would be satisfy
19 whatever minimal relevance.

20 THE COURT: But you haven't even identified him as an
21 officer. I mean you've said, I think you've agreed that he's a
22 principal. But that's a relatively vague term, isn't it?

23 MR. BROSNICK: He's a principal and an employee.
24 Somet is a small enough company that they don't have a formal
25 officers. The title is he is a principal and an employee. But

1 I think what we're talking about, and remember, I don't need to
2 remind Your Honor, it's not -- it's about weighing relevance
3 and burden and the imposition on a third party. We have, the
4 entire point that he used to work at Inter city is, I don't
5 even know why that's been mentioned. That has nothing to do
6 with his ownership stake in Somet.

7 The question is whether the contextual potential
8 relevance of how much he owns on top of being an employee
9 outweighs invading the personal financial stake and forcing a
10 human being, an individual, not even a corporation, to disclose
11 that.

12 THE COURT: I'm going to allow Inter City to take
13 discovery on that issue. And it's going to be limited as Mr.
14 Connolly offered to Mr. Cohen's particulars ownership stake in
15 Somet. I find number one that it is relevant. If Inter City's
16 theory here is that, and I don't know if there's any dispute
17 that Inter City and Somet are direct competitors, and that Mr.
18 Cohen had information or part of that information as an Inter
19 City employee while Inter City was an authorized Michelin brand
20 dealer and learned about Michelin's pricing strategies.

21 And further part of Inter City's theory here is that
22 Somet, and Mr. Cohen particularly, went to some length to
23 essentially undercut Inter City's pricing. And I understand
24 that these are still allegations that have to be proven at
25 trial. But that's certainly relevant information.

1 It's one thing to say an employee is motivated to do
2 that because of an employee of Somet. It's a whole other issue
3 though entirely, and I do agree with Mr. Connolly contextually,
4 if that person has an actual ownership interest and therefore a
5 much more direct stake in Somet's profitability and revenue.

6 In terms of burden certainly, unlike some of the
7 other requests that Inter City has made here, the burden here
8 is minimal. This does not require any extensive document
9 production. It could be answered if the deposition proceeds in
10 the form of a deposition. If the deposition isn't allowed to
11 proceed in the form of a single interrogatory.

12 And nothing about this would constitute a trade
13 secret under the New Jersey definition of trade secret
14 information. Therefore I'm going to allow that. So lets turn
15 now to -- we'll come back to the format by which to do that
16 once we're ruled on some of the other issues. And I think the
17 options become clearer.

18 Lets talk about item number two. These are the
19 documents that refer, et cetera, to Somet's sale of Michelin
20 brand tires from 2006 to 2013. The so-called downstream
21 information.

22 So let me start with you, Mr. Connolly. What
23 specifically do you want? Because quite frankly when I look at
24 item number two it seems to be that you want everything. In
25 other words you want everything for 2006 to 2013 reflecting any

1 sale by Somet of Michelin brand tires. And I've got to tell
2 you, sir, that is extremely broad.

3 MR. CONNOLLY: Your Honor, let me tell you what Inter
4 City would like to obtain from Somet and qualify our request
5 with the notion that we're prepared to be flexible in the
6 manner in which we receive the information.

7 So one possibility may be that in lieu of getting all
8 of the invoices that reflect Somet Tire's sales of Michelin
9 tires during the time frame, if that information can be printed
10 out in a spreadsheet from an electronic database maintained by
11 Somet, that may be acceptable.

12 THE COURT: But wait. So you envision this database
13 containing what information exactly?

14 MR. CONNOLLY: We'd like to know the customers who
15 have purchased Michelin products from Somet Tire during the
16 relevant time frame. And we'd like --

17 THE COURT: So you want basically a customer list?

18 MR. CONNOLLY: Well not all their customers. Just
19 the customers that have purchased Michelin tires.

20 THE COURT: Okay. For a seven year span.

21 MR. CONNOLLY: Well, you know, our request begins in
22 2006, but Mr. Cohen indicates that he didn't arrive at Somet
23 Tire until 2007. So --

24 THE COURT: Okay. Six year span.

25 MR. CONNOLLY: -- 2007 through April of 2014 is, 2013

1 rather is the period that we're interested in.

2 THE COURT: Okay. But with regard to that you want,
3 what you're looking -- are you just looking for a list of
4 customers? In other words, because --

5 MR. CONNOLLY: No. We want more.

6 THE COURT: Okay. What else do you want?

7 MR. CONNOLLY: We'd like to know the prices paid by
8 Somet Tire's customers for Michelin tires. And in conjunction
9 with that the exact model of Michelin tire being sold to the
10 customer. And then there's another --

11 THE COURT: Okay. Go ahead.

12 MR. CONNOLLY: -- area. Part of Inter City's lost
13 profits damages case, Your Honor, is that we lost customers as
14 a result of this price discrimination/tire diversion scheme.
15 And when Inter City Tire loses customers, customers who buy
16 Michelin tires, those customers don't buy only Michelin tires.
17 They come in and seek other services as well.

18 THE COURT: Right.

19 MR. CONNOLLY: And part of our damages case --

20 THE COURT: Right. They need a new battery for
21 example, or a new alternator.

22 MR. CONNOLLY: Alternator, exactly.

23 THE COURT: Uh-huh.

24 MR. CONNOLLY: And so that's part of our damages
25 case. So we want to know what other services were sold by

1 Somet to the customers who purchased Michelin products. Not
2 all of their customers, just those who purchased Michelin
3 products.

4 THE COURT: So you essentially want two categories of
5 customers that will have some degree of overlap. I guess one
6 would be a subset within the other. Right? You want all of
7 the customers who purchased Michelin brand tires for 2007 until
8 April 2013. And then specifically broken out within that if
9 they bought anything else along with their Michelin brand tires
10 you want to know who they were and what they bought.

11 MR. CONNOLLY: Right.

12 THE COURT: Okay.

13 MR. CONNOLLY: And within that universe of
14 information we want to know the prices paid for the Michelin
15 products.

16 THE COURT: Uh-huh.

17 MR. CONNOLLY: Now when the Court is ready I'll go
18 into the reason why that's important to Inter City in
19 connection with the South Carolina case.

20 THE COURT: Okay. Go ahead. I'm ready. Is there
21 anything else that you want on item number two?

22 MR. CONNOLLY: I think that's it.

23 THE COURT: Okay. If you need a minute to confer
24 that's fine.

25 MR. CONNOLLY: In conjunction with the transactions

1 and the pricing information we'd also want the quantity of the
2 tires sold. So pricing, model, quantity.

3 THE COURT: All right. Tell me why this is relevant.
4 And remember -- well, let me start out with this. Can we agree
5 this is trade secret information? There's a lot of cases that
6 have held this is exactly the epicenter of trade secret
7 information, aren't there?

8 MR. CONNOLLY: Your Honor, that's a very good
9 question. And I've given further thought to the issue since
10 then and read some cases. And read the case that Mr. Brosnick
11 indicates that he's principally relying on.

12 THE COURT: The Cytodyne case?

13 MR. CONNOLLY: Yes.

14 THE COURT: Because I do recall you agreed with me on
15 Tuesday that at least some of this information is trade secret.
16 I assume this is among that category.

17 MR. CONNOLLY: Yes. But I don't think it's as simple
18 as is it trade secret, yes or no. And if it is then that's
19 case determinative. Because the way I read the case law, Your
20 Honor, is that there is information that is commercially
21 sensitive information. But there's a whole wide array of how
22 sensitive that information is. And that's a factor that courts
23 take into account in deciding in balancing need versus harm as
24 to what ought to be disclosed.

25 And so what I understand Somet to be claiming to be

1 commercially sensitive information here, I understand it to be
2 three things from having read Mr. Cohen's affidavit.

3 One is the pricing information. Two is the customer
4 list, the identity of the customer. And three is the mix of
5 service and products that are purchased by those particular
6 customers.

7 THE COURT: All of which you're seeking in item
8 number two.

9 MR. CONNOLLY: All of which we're seeking in item
10 number two. That's correct, Your Honor.

11 THE COURT: Right.

12 MR. CONNOLLY: And so what I would say to the Court
13 is can that information be trade secret information? It can be
14 as an abstract point. Whether or not it is in this case, I
15 would respectfully submit that if it is it is marginal at best.
16 And here's why.

17 As to pricing, the pricing here is not pricing that
18 is a closely guarded secret such as exists with unique products
19 such as patented products or products that are sold by a
20 monopolist if you will.

21 This, and based upon Mr. Cohen's own affidavit, this
22 is a highly competitive market. What economists call perfect
23 competition or close to perfect competition. And what happens
24 in a market like that with a product that essentially is a
25 commodity, which is what we're talking about here, Michelin

1 tires. We're not talking about all tires here. We're talking
2 about pricing for Michelin tires.

3 What happens in a highly competitive market is the
4 consumers are price sensitive. And pricing is not guarded or
5 kept from consumers. In fact, and Mr. Videl Erbesh (phonetic)
6 who is one of the vice presidents at Inter City Tire is here
7 today.

8 THE COURT: Is this the gentlemen --

9 MR. CONNOLLY: Correct. To my left, yes.

10 THE COURT: Okay.

11 MR. CONNOLLY: mr. Erbesh is prepared to testify if
12 the Court would require that today, that customers frequently
13 call Inter City Tire, and one would assume all of its
14 competitors, to ask pricing on Michelin products. And they're
15 told that over the phone. So pricing --

16 THE COURT: I believe that. I mean I have no trouble
17 believing that. I don't even know that Mr. Brosnick would
18 refute that. It's simple enough. I want to know whether I can
19 get a better, you know, deal on tires from you or from Somet,
20 I'm going to call. But there's much more to it than that.
21 Right?

22 MR. CONNOLLY: Well as to pricing there really isn't.

23 THE COURT: What about aggregate data? In other
24 words, one of the arguments that Mr. Brosnick had raised both
25 in the brief and I think Mr. Cohen addresses this in the

1 declaration, and it came up on Tuesday, is it's one thing to
2 have that isolated data point. It's a whole other thing to
3 have the aggregate of all of that data from Michelin Tire sales
4 and related product sales over a seven year period.

5 Because then you do start to get insight, don't you?
6 Or at least to be able to draw reasonable inferences about
7 pricing strategy.

8 MR. CONNOLLY: But the question that I'm getting at,
9 Your Honor, is is the pricing information itself truly a trade
10 secret. Is it truly only available to the owner of that
11 information? And the answer here is no, it's not. And I would
12 cite to the Court a few cases, one of which is I would submit
13 far more on point than the Cytodyne case cited by Somet Tire.
14 And that is ARCO Container Corp., v. Warehouser, which is a
15 Western District of Michigan case. The citation is 2009, U.S.
16 District Court Lexis 9264.

17 THE COURT: Is this in your brief?

18 MR. CONNOLLY: No.

19 THE COURT: All right.

20 MR. CONNOLLY: No. And that talks about cases that
21 are product wise similar to this case. You can't even tell
22 from the Cytodyne case what the product is or what the market
23 dynamic is, because the opinion doesn't describe that.

24 But in he Warehouser case the court says although
25 price information can be proprietary it may not be confidential

1 in the least depending on the circumstances. In a highly
2 competitive market, one which approaches the economist's
3 concept of perfect competition, the price level emerges from
4 the interaction of demand with all firms output decisions.
5 Therefore sellers are price takers with no power to set the
6 price.

7 In such competitive markets there are no secrets
8 about price as buyers and sellers are fully informed about the
9 price and availability of product. Sellers in a competitive
10 market make no effort to keep their prices secret, but publish
11 price lists or even post their prices for the whole world to
12 see on the internet.

13 By contrast in less competitive markets sellers have
14 more power to influence price. Such sellers are deemed to have
15 market power defined as a power to control prices or exclude
16 competition.

17 We are, you know, the world is filled with shades of
18 grey, but if one looks at the facts in this case we're talking
19 about a commodity product. And -- product. A Michelin tire.
20 And there are consumers who prefer Michelin tires. It is
21 undisputed Michelin is an elite quality or a high quality tire
22 product. And there are consumers who want that product.

23 The pricing as to that is made readily available to
24 anybody for making the inquiry. It's not protected by Inter
25 City, by Somet, or anybody else. And so under the Warehouser

1 decision I would say that the pricing information itself is, if
2 it's trade secret at all it is not highly guarded, truly
3 confidential, worthy of the type of relief sought here, because
4 it's simply, it's readily available, Your Honor.

5 And add to that --

6 THE COURT: But what about this? What about if lets
7 say customer A calls Somet and says how much for these Michelin
8 tires on Monday. And they say okay, it's X. And then another
9 person calls the next day or say a week later and makes an
10 inquiry and it's X plus Y.

11 Now the second caller may have no idea what the price
12 was. They only know what the price quote was for them. They
13 have no idea what the price quote was for the prior caller.
14 It's the aggregation, isn't it the aggregation of that data
15 that is something that Somet is concerned with? Or reasonably
16 concerned with.

17 MR. CONNOLLY: I will accept the notion that it is,
18 Your Honor. But it is still not confidential. That
19 information given out on Monday and the information given out
20 on Tuesday is being disseminated into the competitive arena in
21 an unprotected fashion.

22 Add to that, Your Honor, the pricing information here
23 that we're seeking is stale. It's two years old.

24 THE COURT: But aren't you -- I'm not sure of that.
25 We'll come back to that in a moment. That's a separate issue.

1 But are you saying then that pricing data can never be trade
2 secret information because by definition it's ultimately shared
3 with whoever buys the product?

4 MR. CONNOLLY: I would say, Your Honor, that there
5 are situations where pricing information is protected as
6 between sellers and buyers. Highly sensitive situations where
7 that type of commercial arrangement exists.

8 But courts recognize that in cases like this, and I
9 can cite a number of cases which have recognized this, that
10 courts have held that price information freely given to
11 customers is not a trade secret. I don't think the Court needs
12 to reach a finding here that this is not a trade secret. But
13 what I want to --

14 THE COURT: You're going to argue in the balancing
15 test --

16 MR. CONNOLLY: Exactly.

17 THE COURT: I got that. So all right. So lets
18 transition to --

19 MR. BROSNICK: Your Honor, if I may address this.
20 Because we covered a lot of ground there. I think it's going
21 to get lost if we try to cover every nuance and then come back
22 and go through a litany of 30 issues.

23 THE COURT: Well here's the thing. I trust that
24 you're going to remember what's important and argue it. If we
25 go back and forth on every point this is going to end up taking

1 four times as long. And we're already an hour in. So, the
2 only other thing left to really discuss here is relevance in
3 any event. And then I'll hear from Mr. Brosnick. So, what is
4 the relevance?

5 MR. CONNOLLY: Before I get to relevance, and I'll
6 get to that in a moment, the other area of sensitivity is the
7 customer list. And I simply want to bring to the Court's
8 attention the fact that consumers of truck tires are publicly
9 available, it's a publicly available list of consumers.
10 Because everybody who operates a truck in this country has to
11 get a DOT number. And the DOT lists the owners and operators
12 of trucks and their DOT number is on a public website. And
13 there's an industry out there of companies that sell lists of
14 truck operators to entities in the businesses in which Somet
15 and Inter City operates.

16 So the consumers of these products are not secret at
17 all. They're publicly available entities.

18 THE COURT: Well you don't know the customer. You
19 only know a potential customer.

20 MR. CONNOLLY: Correct.

21 THE COURT: Okay.

22 MR. CONNOLLY: Correct.

23 THE COURT: All right. So lets talk about relevance.
24 So why -- I understand, I think I understand the relevance of
25 the prices paid for Michelin tires. A party of your -- if your

1 theory essentially is they were able to undercut us, the actual
2 price point for the Michelin brand tires, you're going to
3 argue, goes a long way towards proving whether the undercutting
4 took place. Right?

5 MR. CONNOLLY: Well it's, it really is secondary to
6 that. Because what's more important there is the pricing at
7 which Michelin or those acting on behalf of Michelin sold the
8 tire to Service Tire, if that's the initial purchaser, or Somet
9 Tire. In most of the transactions involving Somet Tire the
10 tires are coming through Service Tire.

11 THE COURT: Right. And you already have that
12 information.

13 MR. CONNOLLY: We already have that information.

14 THE COURT: That's the upstream information you
15 already have.

16 MR. CONNOLLY: Right. So what's important about the
17 price that's charged by Somet to its customers and who those
18 consumers are is Inter City has the burden of showing a causal
19 link between the misconduct here and the harm that it alleges
20 it sustained.

21 And one of the ways in which that can be accomplished
22 is by showing that Somet Tire sold Michelin tires and related
23 services to the very same customer body that Inter City had
24 sold tires to in the past and that Inter City competes with.
25 And the only way to get that information is to get the list of

1 customers who have actually purchased the diverted tire
2 products.

3 One of the claims in this case, Your Honor, is
4 against Service Tire. And it's for intentional interference
5 with advantageous relations. And that is a claim that is based
6 upon the disruption of Inter City's relationship with its
7 customers. The disruption has resulted from the fact that
8 Service Tire in collusion with Michelin has flooded the market
9 in which Inter City competes with tires that are sold at or
10 below the cost that Inter City had with Michelin.

11 So this evidence is among the most relevant evidence
12 in the case to make that point.

13 THE COURT: Why do you need the actual customer
14 identities?

15 MR. CONNOLLY: Because -- well, Your Honor, it's the
16 best evidence of the fact that we've lost customers. That
17 we've lost sales.

18 THE COURT: That can't be presumed from the fact that
19 they're selling tires at say 20 percent less than what you're
20 selling them for.

21 MR. CONNOLLY: Your Honor, I think there can be a
22 presumption drawn from the difference in price. That's
23 correct. But there's always questions when one is in trial
24 about evidentiary issues and what's required by a court. And
25 there's been many arguments made in this case by the lawyers

1 for Service Tire and Michelin that we can't show that we've
2 lost any customers. That has been a mantra that the court in
3 South Carolina has heard throughout discovery in this case.

4 This the evidence that will show these are our
5 customers. We have records as to who our customers are. And
6 we are absolutely certain that we've lost customers to Somet
7 Tire and Service Tire.

8 THE COURT: Did you ever go and ask any of those
9 customers who did you start to buy tires from?

10 MR. CONNOLLY: We've done that, Your Honor, as to
11 some customers.

12 THE COURT: Okay.

13 MR. CONNOLLY: But we're talking about thousands of
14 customers. It is not practical for, and the law doesn't
15 require a plaintiff in a case like this involving Robinson-
16 Patman and intentional interference claims to go out and survey
17 the entire universe of tire consumers in order to prove --

18 THE COURT: No. But as you said it is your burden to
19 prove loss. Now why also -- can you also to some degree show
20 that from a decline in sales of the tire by you?

21 MR. CONNOLLY: Yes.

22 THE COURT: Okay.

23 MR. CONNOLLY: That is one of the facts that's
24 relevant to that analysis.

25 THE COURT: Okay.

1 MR. CONNOLLY: There's a constellation of facts.
2 But, Your Honor, I would submit to the Court, respectfully, the
3 best evidence that we lost customers to this diversion scheme
4 is the list of customers that bought the tires, if we can, and
5 we believe we will be able to, connect the dots to the fact
6 that they used to buy tires from Inter City. They're now
7 buying from Somet. They're now buying from Service Tire.

8 That is the best evidence. It is the most germane
9 evidence to respond to the arguments that the lawyers for
10 Service Tire and Michelin have been making throughout this
11 litigation and no doubt will make throughout the trial starting
12 in February.

13 THE COURT: All right. Mr. Brosnick, you've been
14 very patient. Go ahead.

15 MR. BROSニック: Thank you, Your Honor. Let me, I
16 guess we do have a litany of things to address. But let me
17 start by pointing out an inconsistency. Well let me start by
18 pointing out that Mr. Connolly suggested to the Court that the
19 most granular possible pricing information, not just by
20 customer, but by customer, by transaction, by product and
21 quantity is not a trade secret.

22 I would submit to Your Honor having addressed this
23 issue before the U.S. Department of Justice and numerous
24 courts, that is the most sensitive pricing data that any
25 business has. So contrary to what Mr. Connolly told you, and

1 it's not, if there is a range, and I don't disagree there is a
2 range of sensitivity in trade secrets, this is at the bright
3 red most sensitive part. Perhaps only with the actual secret
4 formula of Coke to the other side of it.

5 I would also like to point out an inconsistency. Mr.
6 Connolly persuaded Your Honor to force Somet and Mr. Cohen to
7 divulge his percentage of the ownership by claiming that
8 Michelin's pricing in 2003 and '04 and '05 was relevant and
9 important to their case taking place in 2015. But now he's
10 standing up and saying Somet's pricing in 2008, '09, '10, '11,
11 '12, and '13, oh, that's stale. It's irrelevant.

12 Mr. Cohen's testimony is undisputed in the record
13 before Your Honor. Pricing as recently as 2012 and '13 is
14 absolutely competitively relevant. And the pattern of
15 prices --

16 THE COURT: I'm sorry. Wait. Say that again.
17 Pricing from when?

18 MR. BROSnick: The pricing at least from the last few
19 years, from 2011, I believe Mr. Cohen testified from '11, '12,
20 and '13 is still competitively relevant. And if you look at
21 the pattern and changes in pricing over a period of time,
22 perhaps not from mid-2006 to the end of 2006, perhaps that's
23 actually stale, although Mr. Connolly disagreed that that was
24 stale, does he argue to Your Honor that Michelin's pricing from
25 even older is still relevant because Mr. Cohen knows about from

1 2004.

2 THE COURT: I'm not sure that I buy that correlation.
3 But in any event --

4 MR. BROSNICK: But in any event, my point is that
5 pricing data is absolutely the most relevant. And it's not
6 just pricing data. If we were talking, I agree with what Your
7 Honor was saying, if we were talking about the average price of
8 a Michelin tire sold in 2012, that would be, I'd have to take
9 that back to my client, to, Judge, exactly how, Mr. Cohen is
10 not here. I can't ask him how relevant would that be. Or how
11 sensitive would that be.

12 But now we're talking, Your Honor, used one example
13 of a customer who calls on Monday and another customer calls
14 the next week. I'll take that -- that's absolutely correct and
15 I'll take that example two steps further.

16 Two customers call on the same day. But one of them
17 is buying more tires or one of them buys more often, or one of
18 them is a bigger customer and gets a different price. Or the
19 next customer is also buying other products and gets different
20 pricing.

21 The trick that Mr. Connolly tried to pull in saying
22 Michelin tire is a commodity is he ignored the premise, I don't
23 want to get too economically complicated here, but --

24 THE COURT: Please don't.

25 MR. BROSNICK: -- he ignored what's called a

1 differentiated pricing. If I'm going to Walmart and buying a
2 thing off the shelf where it costs \$10 to me, it costs \$10 to
3 you, it costs \$10 to Mr. Connolly, everybody, then at least
4 there's an argument to be had that everyone knows what that
5 cost is.

6 And the case Mr. Connolly cited, which wasn't cited
7 in his papers so I did not -- read, he said talked about
8 published price lists. And I would agree. If there is a price
9 list on the internet then --

10 THE COURT: If there were prices on the internet this
11 wouldn't be in front of me for an issue --

12 MR. BROSNICK: Exactly.

13 THE COURT: -- because it would be a publicly
14 available right.

15 MR. BROSNICK: Exactly. What the issue here is the
16 differentiated pricing. Is the idea that every customer gets a
17 different price. And I would point Your Honor to the citation
18 of My Systems Corp., v. Peak Computer Industries, from the
19 Ninth Circuit that is cited at page 18 of our brief. And I'll
20 quote, well proofs --

21 THE COURT: I read it.

22 MR. BROSNICK: I'll quote it. It says, --
23 information "allows a competitor to direct its sales efforts to
24 those potential customers" that are already in that market for
25 the specific product.

1 Michelin tires, first of all I don't accept the idea
2 that Michelin tires are a commodity. And obviously I think
3 people go to Michelin it's the opposite of a commodity.
4 Michelin tires are a brand that draw people in. But even that,
5 Michelin tires are not themselves one product. It is an array
6 of models, some customers have demand for particular models,
7 some what the highest model, some want to buy other things.
8 The pricing, if the pricing were generic we wouldn't be here.
9 The pricing is as individual and granular, and that is
10 precisely why it is so sensitive.

11 Let me say further, let me further I just addressed
12 pricing. Most of the cases that talk about this area of the
13 law, most of the cases cited in Somet's briefing, address
14 customer lists and rule that customer lists are trade secrets
15 and can't be produced.

16 I want to impress on the Court how much more than
17 customer lists we're talking about. We're talking about not
18 just the customers -- we're talking about the customer, what it
19 bought, on specific dates, in what quantities, at what prices,
20 at a transactional level. You can not get more granular than
21 that. And I would argue that just the customer list is a trade
22 secret and not I am, almost every court that's ever addressed
23 this.

24 This issue as to sensitivity is the Cytodyne case.
25 And this will allow me to transition to relevance.

1 In the Cytodyne case the party seeking discovery made
2 the precise argument that Mr. Connolly and Inter City are
3 making today. It was a Robinson-Patman case that they needed
4 the pricing information from their competitor in order to show
5 that they had lost customers and were being undercut in the
6 market. Exactly.

7 The motion was quashed. There was no compromise.
8 There was no, oh, I'll force you to produce this much of your
9 trade secrets. There was no compromise. The subpoena was
10 quashed because there had been no proof of lost customers
11 listed.

12 I would submit, I would still be making many of these
13 same arguments, but I would be in a more difficult position if
14 the subpoena had shown that Inter City had lost these six, or
15 these nine, or these 14 customers and had reason to believe
16 that they were buying from Somet.

17 Mr. Connolly has already told you that who buys, it's
18 a public market. People, it's fairly transparent. People
19 know. You can see where trucks go. Though not with what
20 frequency. But if we were talking about more granular, if
21 Inter City had made a representation, put proof before the
22 Court that we've lost customers A, B, C, and D. And certainly
23 they have the records. They know who their customers were in
24 2008 and they could probably see well those customers didn't
25 buy from us in 2009, '10, and '11. They might be --

1 THE COURT: Yeah. But I mean you can understand why
2 if you were in his position you would want something that
3 suggests more of a direct correlation than that. Right? Other
4 than this they were here one day and gone the next.

5 MR. BROSNICK: I would, if I were in his position I
6 wouldn't want to go on a fishing expedition and I certainly
7 wouldn't expect the Court to ask my competitor to produce --
8 because I don't want to identify customers. I have a party who
9 has an interest in this don't want to identify any of my
10 information. You need to identify literally every piece of
11 information. And that's really the relevance issue.

12 The broad theory of relevance, the idea that a
13 competitor of sales or a competitor of products, I'll concede
14 that. On a Robinson-Patman claim broad theory pricing can be
15 relevant which is why Your Honor's idea of aggregate annual
16 data I do want to take that back to my client. That's
17 something to consider if Your Honor wants to go there.

18 But the idea of -- the Cytodyne case, the reason I
19 cited it even though it's in Florida, well it was a New Jersey
20 underlying case, is precisely this case. The discovery party
21 asked, offered the same information and the subpoena was
22 quashed precisely because it had not offered proof of lost
23 customers or even that market share was offered to that
24 customer.

25 I would also direct, I know none of this was

1 addressed. I would also highlight the PPL Energy Plus case
2 where it -- give me a minute, Your Honor. I think the quote is
3 worth hearing. I'm reading from the court's opinion, this
4 Court's opinion, this is from New Jersey. Here the subpoena
5 would effectively require the participants to disclose
6 confidential proprietary business information to the
7 competitors. This fact alone presents significant hardships,
8 especially in light of the participant's non-party status.

9 And then that court went even further to the point
10 that I think is also germane here and has not been addressed,
11 the harm to the market that would occur.

12 If Somet is crippled here, if Somet's pricing
13 information goes out, if Inter City learns -- in order to get
14 business from X, Y, Z trucking, I only need to beat this price.
15 Or I know that they -- I only need to offer them a discount on
16 this ancillary product and not the other one.

17 The customer, Somet will be demolished. So in that
18 sense the market will be harmed because there will be less
19 competition out there overall. But even the particular
20 customers will be harmed because Inter City will have learned
21 the particular deal that was negotiated with Inter City.

22 THE COURT: Wait, I'm sorry.

23 MR. BROSNICK: Inter City will have learned the
24 particular deal that was negotiated on each occasion with
25 Somet.

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1 THE COURT: With each customer.

2 MR. BROSNICK: With Somet.

3 THE COURT: Right.

4 MR. BROSNICK: And then Inter City will say --

5 THE COURT: Wait. Well one of the deals that was
6 negotiated between Somet and particular customers.

7 MR. BROSNICK: Right.

8 THE COURT: Right.

9 MR. BROSNICK: So Inter City will have learned, and
10 this is what Your Honor is --

11 THE COURT: Yeah, the PPL case discusses it.

12 MR. BROSNICK: Yeah, this is what Your Honor's
13 colleague was referencing. That Inter City will have learned I
14 don't need to go below that price. This is the limit of where
15 I need to go.

16 THE COURT: All right. But this practically doesn't
17 scream for Mr. Connolly, at least up until a certain point, to
18 say that it's purely historical and how does that information
19 give Inter City any sort of unfair competitive market advantage
20 in 2015?

21 MR. BROSNICK: Your Honor, I mean one I would go back
22 to Mr. Cohen's testimony and say that --

23 THE COURT: It hasn't changed much. Okay.

24 MR. BROSNICK: Looking at the pricing information
25 from recent years does absolutely give information and insight

1 because --

2 THE COURT: Well what about '06, '07, '08?

3 MR. BROSNICK: Well '06 isn't relevant because --

4 THE COURT: Okay. '07 after Mr. Cohen arrives at --

5 MR. BROSNICK: Right. So '07 itself I would probably
6 concede is not that relevant. But what we're talking about and
7 to address one point Mr. Connolly raised, although I'd be happy
8 with a spreadsheet, this kind of crosses over to expense
9 burden, Somet being a small company with only two employees in
10 charge of records, and not like, you know, other huge companies
11 that maintain records back in time, they only have computer
12 records back approximately two years. They go back to some
13 point in, I forget, it's either late 2012 or early 2013.

14 So they don't have computer records going back. They
15 would be talking about having to go back and either produce
16 volumes, thousands and thousands of invoices which would also
17 contain a lot of other information. You know, customers,
18 addresses, all that other particular information, unless they
19 wanted to pay me tens of thousands of dollars more to redact
20 all of that.

21 But also it would not be possible to produce that.
22 It would not possible without a huge amount of expense to
23 recreate it, so as to produce that in an aggregated summarized
24 form. And the only period of time for which Somet could
25 produce aggregated information without huge expense and effort

1 burden would be the most sensitive period, you know, the last
2 two, two and a half years.

3 THE COURT: Which would be what? 2012?

4 MR. BROSニック: I could find, I could call and find
5 the exact date. I just don't recall as I stand here today.
6 But it's in our brief because, it's my affidavit actually
7 because Inter City's papers accused Somet of not, of violating
8 the subpoena and not producing electronic form when it had been
9 requested.

10 And I specifically had that discussion with Mr.
11 Connolly's partner and explained. And in October I did know
12 the exact month that the electronic records went back to. And
13 I asked her, do you want the electronic records or do you want
14 us to draw all the paper. We don't want to do both, that would
15 be an undue burden. She elected paper. And that's why we
16 produced the paper.

17 THE COURT: All right.

18 MR. BROSニック: For the upstream information. But I
19 believe I've covered, I'm prepared to address any of Your
20 Honor's, I think the final point I'll make is that on relevance
21 if there's going to be a burden of which party needed to go
22 into its records and substantiate something, I would urge Your
23 Honor to reach the same decision as the Cytodyne case did.

24 It's the burden of issuing a particular live subpoena
25 for the information that was needed, especially here at the eve

1 of trial where everything else has to be known.

2 If Mr. Connolly referenced that Service Tire is the
3 one in the alleged diversion scheme, I don't know what the
4 numbers are. I can't say whether it would have been an undue
5 burden anyway. But my argument here today would be different
6 if the subpoena had been here's a record of what tires were
7 diverted. We have evidence they were diverted.

8 And we also can show what period of time my customers
9 have been lost. And so we're seeking this line item, this
10 customer, this batch of tires, serial numbers X, Y, Z that we
11 got discovery from Michelin or Service Tire or one of the other
12 parties.

13 That would be at least a different argument to have.
14 And I respectfully submit that the difference between that and
15 this is why the phrase fishing expedition was introduced into
16 the law.

17 THE COURT: What about -- so the aggregation, because
18 frankly I have been considering at least some of the aggregate
19 data approach. For the period of say 2007 to 2010 or 2011,
20 you're saying that's not possible. Right?

21 MR. BROSnick: It's only possible if someone like me
22 or an associate of mine spends a hundred hours going through
23 reams of invoices and physically doing it. And I would submit
24 that that -- we've been talking all morning about the burden
25 from a competitive standpoint, which is the primary issue.

1 THE COURT: I understand there's a production burden
2 and it's under Rule 26. But, and for that matter Rule 45 and
3 case law interpreting Rule 45 do allow the Court to shift costs
4 if necessary. Essentially to honor the requirement under Rule
5 45(C)(2)(b)(ii) as is noted in the advisory committee notes
6 that a non-party required to produce documents and materials is
7 protected against significant expense resulting from
8 involuntary assistance of the court.

9 This provision applies, for example, to a non-party
10 required to provide a list of class members. A court is not
11 required to affix the cost in advance of production. But it
12 may be -- on certain costs to be determined until after.

13 Why can't I require, if Mr. Connolly and Inter City
14 really wants this data, to pay the costs of its production?

15 MR. BROSNICK: With respect to the cost of my
16 associate aggregating the reams of invoices I agree. That
17 would resolve the expense burden.

18 The other half of the production burden is telling
19 the two employees who do records at Somet that you have to go
20 back into your records for now the fourth time and gather all
21 this stuff and segregate it, and get it to me and then spend
22 time on the phone with my associate going back and forth with
23 questions.

24 That part, I mean I suppose we could ascribe an
25 hourly rate for financial to compensate them. But they

1 wouldn't be doing their job. I mean Somet actually is a
2 business and these people are on the phone with customers, are
3 pulling invoices to do -- they're also customer
4 service/records. So it would be a material burden just that
5 aspect to them.

6 But the expense side of it I agree with Your Honor.
7 If I could send my firm's bill and the hourly cost allocated to
8 the hours that Somet's people took to gather the records as to
9 the expense side at least, and not the occupying employees
10 side, would be resolved.

11 THE COURT: All right. We're going to take -- we've
12 been going for an hour and a half. We're going to take a five
13 minute break and then I'm going to come back. We're going to
14 rule on this and then we're going to talk about the bank
15 subpoenas.

16 MR. BROSnick: Thank you, Your Honor.

17 MR. Connolly: Your Honor, I have a couple of points
18 I'd like to respond to.

19 THE COURT: Very quickly, Mr. Connolly because --
20 this is, look, let's be clear about this. This has been
21 exhaustively briefed. I have read, as I think you've seen, the
22 papers rather thoroughly. We had a hearing on Tuesday, which I
23 understand was truncated because of some other matters and the
24 need to leave early. And we've already been going on this one
25 issue an hour and a half. We still have the bank subpoenas and

1 we still have the 30(B)(6). So unless you're prepared to stay
2 here until Monday we need to, you know, address each item and
3 move on.

4 So if you've got something to tell me fine. But it's
5 got to be brief because obviously I'm going to have to allow
6 Mr. Brosnick to respond if he wants.

7 MR. CONNOLLY: The one factor that I didn't mention
8 initially, Your Honor, it's the reason I gave the documents to
9 the Court, is that in balancing all of the factors that the
10 Court should take into account in evaluating harm versus
11 burden.

12 The Court, I respectfully submit, should look at the
13 fact that the documentation previously produced, and I'll cite
14 as an example the document with the bates number Somet 0082,
15 shows --

16 THE COURT: 082?

17 MR. CONNOLLY: 0082.

18 THE COURT: Yeah, okay.

19 MR. CONNOLLY: That's a Service Tire invoice that the
20 Court can see under the ship to says it's to Lafarge North
21 America, which has been scratched out and the word Somet is
22 written in there.

23 THE COURT: Right.

24 MR. CONNOLLY: And that's one of numerous examples of
25 invoices which show, and this is why Mr. Cohen's knowledge from

1 working at Inter City Tire is so relevant, that shows that Mr.
2 Cohen knows that he is buying national account tires. He's not
3 buying tires that Service Tire got through the ordinary
4 channels at Service Tire. And in fact that is conceded in
5 emails which I could also cite to the Court that were produced
6 by Somet Tire.

7 Somet Tire acknowledges that they are producing
8 national account tires. In fact let me draw the Court's
9 attention to one more document. Somet 02575.

10 THE COURT: Wait. Okay. Got it.

11 MR. CONNOLLY: So that's an email from Marsha Oliveri
12 (phonetic), an employee of Somet Tire to Mike Gavin of Service
13 Tire. And she says, Mike, regarding a particular Michelin tire
14 model we can't put these tires through national account
15 anymore?

16 Somet Tire, Your Honor, because Mr. Cohen worked at
17 Inter City, they know this is an illegal fraudulent diversion
18 scheme. And they're taking advantage of it. This is exactly
19 the language that reflects the fact that Somet Tire knows
20 they're getting diverted national account tires.

21 So that level of complicity in a fraudulent scheme I
22 respectfully submit should be taken into account by the Court
23 when considering the burden and the other arguments made by Mr.
24 Brosnick.

25 THE COURT: All right. Fair enough.

1 MR. BROSニック: If I may just for a moment. I agree
2 with Your Honor it's been a long morning. This goes back to --
3 there are two responses. One, it doesn't actually show what
4 Mr. Cohen just said. It shows that Somet knew it was getting a
5 deal. It does not show that Somet was involved in any scheme
6 or knew that it wasn't supposed to be involved in getting a
7 national account.

8 THE COURT: No. But what it does tend to show, at
9 least as to the second of the two, is at least an expectation
10 that Michelin Tires are being billed through the national
11 account. And that's the second tier pricing. Right?

12 MR. BROSニック: That I concede. It does show that.
13 But it doesn't show that Ms. Oliveri knew that that was
14 something you couldn't get. And I will submit to Your Honor's
15 consumer. When you go somewhere and someone offers you a
16 discount how often do you question, wait a minute, am I really
17 entitled to that discount. Don't give me that discount.

18 How often do you really question a vendor to say --
19 if I'm going to buy a new car and the car salesman says we have
20 a special deal because we're being sponsored by Ford today. Do
21 you say wait a minute. I live in X county. Am I entitled to
22 that discount? Let me pay more.

23 I submit that Somet does not do that either. But
24 more importantly than that, and really I think the broader
25 point that goes to -- Mr. Connolly has highlighted two

1 documents. And he could probably highlight half a dozen or
2 maybe even a dozen documents that arguably raise some kind of a
3 potential inference.

4 THE COURT: Let me step back a bit. You were talking
5 about the discount issue. Lets say, for example, I went to go
6 buy a car and the car dealer says you know what, we've got a
7 great deal for you. We've got the recent college graduate
8 deal. Okay. And you can save, you know, 25 percent.

9 As much as I'd like to fancy myself young enough to
10 have recently graduated, you know if there's -- the idea of
11 essentially saying well okay, I'll overlook that so I get the
12 better deal, I don't know that I necessary agree with your
13 premise.

14 MR. BROSNICK: They're really two responses to that.
15 One is that Somet was, or you would be under no duty to the car
16 dealer to disclose when you graduated college. And you
17 wouldn't be violating any law or duty to not do that.

18 THE COURT: Okay.

19 MR. BROSNICK: But two, and I think more importantly,
20 it is objectively obvious well you may have gone to college
21 later in life --

22 THE COURT: No, you could say it. It's objectively
23 obvious.

24 MR. BROSNICK: -- whereas it is not objectively
25 obvious that national account discounts are not available on

1 the second level.

2 THE COURT: Okay.

3 MR. BROSNICK: Now maybe, I know Mr. Connolly has
4 represented that from a decade ago Mr. Cohen had some
5 information. I don't know whether Ms. Oliveri would have that
6 information. But in any event that is beside the point of what
7 we're discussing this morning because it's entirely possible
8 that whatever information Somet has, if it has any, came from
9 Service Tire. Came from its actual dealer. Who knows? No
10 discovery has been taken on that. And Inter City has put
11 nothing before the Court.

12 But I think the more important point, the broader
13 point I really wanted to make, is if you look at these two or
14 half a dozen, or even dozen documents, it comes back to the
15 difference between a fishing expedition and targeted proper
16 discovery to a non-party.

17 We would be having a different argument if Mr.
18 Connolly had issued a subpoena during the discovery period
19 saying we produced these records that he chose from here. We
20 produced these records on November 10th. I believe. In early
21 November. If Mr. Connolly -- and they issued -- if they had
22 issued another subpoena on November 17th and November 20th, or
23 on December 2nd, asking for further documentation regarding
24 these specific transactions, I would have a more difficult
25 argument here this morning. They didn't do that.

1 And they stood on their request number two and
2 foreshadowing what we'll discuss after the break, they issued
3 an even broader fishing expedition in the 30(B)(6).

4 THE COURT: Yeah. Here's what we're going to do.
5 We're going to take a break now. I'm going to come back. I'm
6 going to rule. Then we're going to deal with the bank
7 subpoenas and then we're going to deal with the 30(B)(6).
8 Because I can't help but wonder at the end of the day if
9 rulings on these other things may help clarify where you folks
10 are going to go and not go in the 30(B)(6). If it goes
11 forward.

12 All right. So it is 11:35. We'll resume in ten
13 minutes.

14 MR. BROSNICK: Thank you, Your Honor.

15 MR. CONNOLLY: Thank you, Your Honor.

16 (Ten minute recess.)

17 MR. BROSNICK: I confirmed two factual things that
18 came up during the morning session.

19 THE COURT: Okay.

20 MR. BROSNICK: First is that I was correct that
21 Somet's computer system maintains active -- it only has a two
22 year capacity. Because of the subpoena they have records back
23 into 2012. But in the normal course they would only now have
24 2013 and '14.

25 And I spoke to one of the two records employees about

1 what would be involved in you going to gather all Michelin
2 invoices from 2007 to '10. She was flummoxed. The idea she
3 said we'd have to out to the warehouse through dozens and
4 dozens of boxes and spend days shifting through to try to
5 figure out what to send you.

6 THE COURT: For what period of time?

7 MR. BROSNICK: Your Honor had referenced 2007 to '10.

8 THE COURT: Yeah.

9 MR. BROSNICK: Which is why that's what I asked her
10 about.

11 THE COURT: Yeah.

12 MR. BROSNICK: It would be, well the point that Your
13 Honor made this morning that I agreed with was that the expense
14 portion of the burden could be addressed, the cost shifting.

15 THE COURT: Right.

16 MR. BROSNICK: The effort part of the burden
17 obviously couldn't be.

18 THE COURT: All right. What would be entailed, Mr.
19 Brosnick, in for the 2007 to 2010 documents in acquiring
20 pricing only information? I know that's clearly not what Inter
21 City wants. I'll address that in a moment. I'm just trying to
22 get an understanding as to those, for those records how at
23 least some of that data would be provided and what would be
24 entailed in that. Given that -- keeping in mind that you folks
25 are going to trial next month too.

1 MR. BROSNICK: If we're talking about pricing of all
2 Michelin tires by model, that were sold in those years, we'd be
3 talking about only one of the two employees could be devoted to
4 the task because the other one would actually have to work
5 doing Somet's jobs.

6 THE COURT: Sure.

7 MR. BROSNICK: We'd be talking about one employee
8 going into the back part of their facility where there are
9 dozens, if not hundreds of boxes. Figuring out which boxes
10 have relevant invoices from Michelin -- invoices are organized
11 by customer not by product sold. So if someone bought a
12 Michelin invoice that could be in the folder right next to
13 where they bought another type of tire or got servicing.

14 It would involve someone spending days, if not weeks,
15 going through all those boxes. Organize and segregating out
16 the records that deal with this. And then giving them, then
17 shipping them to my firm and then my associate who was here the
18 other day and probably another one spending a lot of time going
19 through and pulling off the price information to create
20 spreadsheets. I suppose a paralegal could help with that as
21 well.

22 THE COURT: Uh-huh.

23 MR. BROSNICK: But it would be a dramatic
24 undertaking. And that, Your Honor, just to be clear, only
25 addresses the Michelin tires. It would be a exponential amount

1 of financial. It would be three, four, maybe ten times more to
2 also cover products that were purchased with each Michelin
3 tire.

4 THE COURT: I understand. Mr. Connolly, what am I
5 supposed to do with that? I mean it can't simply be make them
6 produce it because logistically it sounds to me that under the
7 best of circumstances that may be unreasonable. And given the
8 trial date that is really a problem, to put it mildly.

9 MR. CONNOLLY: May I have a moment to confer with my
10 client, Your Honor?

11 THE COURT: Take all the time you need.

12 (Brief pause.)

13 MR. CONNOLLY: Your Honor, what I would like to
14 propose is that Inter City pay the cost of having temporary
15 workers visit the Somet Tire document warehouse and under the
16 supervision of a Somet Tire employee review the records and
17 record and copy to the extent necessary the documents that are
18 pertinent during the period of time that the Court allows.

19 And that way the work is, there's no burden beyond
20 the supervisory component on Somet Tires resources. We pay the
21 cost of the reviewers. And respectfully I don't think we need
22 a law firm to review any of this. We're talking about getting
23 customer names and pricing. There doesn't seem to me to be a
24 need for a lawyer to review this. It's simply a ministerial
25 job of recording information and copying documents.

1 And obviously anything that we record and copy we
2 would share with Somet Tire and the parties in the South
3 Carolina litigation.

4 MR. BROSNICK: Your Honor, first I certainly hope
5 that dealing with customers' names and pricing --

6 THE COURT: Well putting that aside. What about the
7 idea of --

8 MR. BROSNICK: -- as an antitrust lawyer I would
9 submit that it is --

10 THE COURT: I understand that. What about though Mr.
11 Connolly's idea of having some essentially third party document
12 custodian just review the documents to cull out the relevant
13 and material that Inter City would pay for.

14 MR. BROSNICK: There are really two responses.
15 First, it would materially reduce the burden because as Mr.
16 Connolly pointed out the same one of the two employees would
17 have to be there supervising the whole time. So the actual
18 work she needs to be doing wouldn't be as onerous.

19 THE COURT: Right. Presumably though with multiple
20 hands on deck culling it would go quicker. Wouldn't it?

21 MR. BROSNICK: It would go quicker with multiple
22 hands. But that's assuming that someone who does not know
23 Somet's records at all could do this independently. I think as
24 a practical matter it would take someone who knows Somet's
25 filing system and who knows who the customers are and knows

1 where records have gone and how it's done, and to be constantly
2 on call.

3 I would concede that it would go faster to have more
4 people, that person supervising three, four, ten, other people.
5 But it would be a tremendous imposition. A, it would still
6 fully occupy that one person for whatever length of time. But
7 B, it would be a tremendous imposition to have third party
8 individuals coming in, direct, who weren't under Somet's
9 control, going through records directly -- and then if I
10 understood Mr. Connolly correctly, giving records directly to
11 Inter City.

12 THE COURT: Well that's his proposal.

13 MR. BROSNICK: Yeah. So if, in a litigation sense,
14 if the proposal is culling things out that are then reviewed by
15 the Somet people and potentially by me, then we're talking --
16 would it reduce the effort and expense? Yes. Would it reduce
17 it to a level that it would take less than a few weeks to
18 accomplish and be -- at some point it's almost like asking if I
19 shoot you six times instead of 12 times is that going to kill
20 you less. I'll have fewer holes in me, but I'm going to be
21 dead.

22 THE COURT: All right. Let me provide some
23 background because I do think this also may help to some degree
24 with the other rulings. I've carefully considered the parties'
25 arguments with respect to this issue.

1 Certainly under Rule 26 relevant information for
2 discovery purposes need not be admissible at trial if the
3 discovery appears reasonable calculated to lead to the
4 discovery of admissible evidence.

5 It's a little bit different here where we are at the
6 very end stage of fact discovery. And it's not necessarily
7 accurate to say that the discovery will lead to additional
8 discovery since the only open items are these particular
9 subpoenas.

10 But be that as it may, the purpose of discovery, of
11 course, is to uncover facts about the claims and defenses set
12 forth in pleadings. And therefore the boundaries of relevance
13 under Rule 26 depend on the context of each action. See,
14 Selmone v. Carter Retail, 2011 West law 1458063 at page two,
15 District of New Jersey April 14, 2011. The determination of
16 relevance is within this Court's discretion. Id., at page two.

17 Generally courts do construe Rule 26 "broadly to
18 encompass any matter that bears on or that could reasonable
19 lead to other matters thereon, any issue that is or may be in
20 the case". Oppenheimer Fund v. Sanders, 437 U.S. 340 at 351,
21 1978.

22 However, Rule 26 makes clear that "the trial court
23 retains broad discretion to determine that a discovery request
24 is too broad and oppressive". See, Schneck v. IBM, 1993 West
25 law 765638, at page two, District of New Jersey, July 27, 1993,

1 quoting Marshall v. Westinghouse, 576 F.2d 588 at 591, Fifth
2 Circuit, 1978.

3 With respect to the current dispute regarding item
4 number two of the subpoena, of course the Court has to consider
5 whether it constitutes trade secret information. That is
6 particularly a sensitive fact considering that it's beyond
7 dispute that ICT -- well Inter City and Somet are direct
8 competitors in the truck tire sales market.

9 As the court in the Cytodyne Technologies case, 216
10 FRD 533, Middle District of Florida, 2003, instructed, the
11 analysis of whether a party must disclose trade secret
12 information is a multi-step analysis. Number one, does the
13 material constitute a trade secret? Two, would disclosure of
14 that material harm the producing party? And I would note as
15 the Cytodyne court did, that a court may presume harm if the
16 disclosure is to a direct competitor. But that's a rebuttal
17 presumption. And then three, does the need for the discovery
18 outweigh the harm caused by the disclosure?

19 In New Jersey trade secret information is defined
20 according to the Restatement of Torts. That provides, "a trade
21 secret may consist of any formula, pattern, device, or
22 compilation of information which is used in one's business and
23 which gives him an opportunity to obtain an advantage over
24 competitors who do not know or use it." See, Rohm and Haas
25 Company v. ADCO Chemical, 689 F.2d 424, 431, Third Circuit

1 1982, citing the Restatement of Torts, Section 757, and comment
2 B. See, also, P.C. of Yonkers v. Celebrations, 2007 West law
3 708978 at page ten, District of New Jersey, March 5, 2007.
4 Quoting Rohm and Haas, 689 F.2d at 431.

5 As the district court noted in P.C. of Yonkers, "a
6 trade secret is information which is the secret of a particular
7 employer and not a matter of general knowledge in the
8 industry." P.C. of Yonkers, 2007 West law 708978 at page ten.

9 In P.C. of Yonkers, the district court concluded that
10 the plaintiff company's revenue, customer data, and sales data
11 constituted trade secret information because one, it was
12 compiled in the course of plaintiff's business for the use of
13 plaintiff's business; and, two, plaintiff collected the data
14 for its exclusive use and did not generally disseminate it to
15 the public. See, Id., at page 11.

16 The court in P.C. of Yonkers pointed to several other
17 cases that have held that customer data bases can constitute
18 trade secret information where one, the owner of that
19 information took reasonable steps to protect its secrecy; and,
20 two, the competitor can use that information to its direct
21 economic advantage or to the disadvantage of the owner of that
22 information. See, Id., at 11. Citing, MAI Systems v. Peak
23 Computer, 991 F.2d 511 at 521, Ninth Circuit 1993. See, also,
24 Apollo Technologies v. Centrosphere Industries, 805 F.Supp.
25 1157, 1204, District of New Jersey 1992, where in the court

1 stated, "in appropriate circumstances information on pricing,
2 discounts, and other relevant customer data may enable an agent
3 to take unfair advantage of its principal and therefore
4 constitute protectable trade secrets."

5 In this case Inter City seeks with respect to item
6 number two, one, customers who purchased Michelin tires from
7 STTC for the period of, as discussed during the argument,
8 approximately 2007 when Mr. Cohen arrived there from Inter City
9 until the period of April, end of April 2013. Two, the prices
10 paid by Service Tire customers for Michelin tires according to
11 the exact model, including the exact model of tire, Michelin
12 tire being sold.

13 And, three, because Inter City argues they lost
14 customers as a result of the Michelin brand tire price cutting,
15 it also wants to know what other services were sold to
16 customers who had also purchased Michelin brand tires. They
17 want to know the quantities, the pricing, and the model.

18 Now the first issue is whether this material
19 constitutes a trade secret. And as oral argument bore out the
20 parties have different views on this. I find based on the
21 record, the parties' arguments, that the material does in the
22 aggregate constitute trade secret information. Certainly Mr.
23 Connolly's argument is well taken insofar as an individual
24 quote. For example, as we discussed during the argument a
25 customer calling and finding out from Somet what a set of four

1 Michelin brand tires and a particular model will cost on a
2 particular day. That data point by itself is not necessary a
3 protectable trade secret because it's shared with that
4 individual.

5 But it's a whole other matter entirely to say that
6 the aggregate of that, the movement of prices, the very prices
7 given to different customers according to quantity bought,
8 according to when they bought, and perhaps other things that
9 they've purchased, that the aggregate of that has been publicly
10 released just because in each individual transaction that
11 matter was known by both Somet and the customer.

12 As Mr. Brosnick noted during the argument this isn't
13 a situation where one could easily go on Somet's, a Somet
14 website and see the exact price per tire, per Michelin brand
15 tire on each and every day.

16 Were this information publicly disseminated in that
17 manner the Court may reach a very different result. It also
18 may be the case that this matter wouldn't even be before the
19 Court.

20 But I cannot find that the aggregate of this data
21 over a approximately six year span with individual price points
22 per tire per customer, to hold that that is not trade secret
23 information because the individual customers knew that data.
24 That to me clearly is at the heartland of trade secret
25 information. To hold otherwise would essentially say that that

1 sort of customer data could never be trade secret information
2 because the customer always knows presumably what they're
3 buying and at what price.

4 When I consider also whether the record demonstrates
5 that Somet has reasonably expected that this information would
6 remain confidential, I find that they do. For example, the
7 Cohen affidavit at paragraph ten states that the "identities of
8 Somet's customers, the specific products and services they
9 choose to purchase from Somet, and which customer purchases
10 which products and services, and Somet's pricing to customers
11 and pricing strategies for particular products and services are
12 not generally known to anyone outside of Somet. Indeed Somet
13 instructs its employees not to reveal such competitively
14 sensitive trade secrets to anyone outside of Somet and
15 restricts access to its computer and other files to employees
16 who need such information as part of the performance of their
17 duties for Somet."

18 Similarly Mr. Cohen notes in paragraph 13 of his
19 affidavit that the competitive harm is magnified "by the fact
20 that Inter City subpoenas seek such pricing information not
21 just in the aggregate but also by customer, product, product
22 type, and market segment".

23 Because in part Inter City looks for that information
24 on both the micro and the macro level, it is my conclusion that
25 that information in terms of the customer lists and the much

1 more so than that, the exact transaction per customer according
2 to price and item or items or service purchased clearly
3 constitutes trade secret information.

4 That doesn't end the inquiry though. Because as the
5 Cytodyne court noted there are still two other questions. One,
6 would disclosure of that information cause harm. Clearly in
7 this case I find that disclosure of that information would.
8 First, I can presume that because Inter City is a direct
9 competitor of Somet Tire. They are geographically near each
10 other. They have both acknowledged selling to the same
11 marketplace and selling the same or very similar products and
12 services. So I can presume that.

13 Now Inter City argues that this information is for
14 the most part at least stale. That it goes back several years
15 and that insight into these transactions from say five years
16 ago, or six years ago gives it no competitive advantage and
17 will cause no harm to Somet.

18 Respectfully I must disagree. It may be one thing if
19 all Inter City were looking for were data say for example for
20 the period of 2007 to 2009. They are not. And I understand
21 they're not because their theory of the case is that this price
22 cutting theory, scheme rather, spanned the period of time that
23 it did, i.e., 2006 to 2013.

24 But the data that they're looking for and the
25 aggregation of that data from 2006 or 2007 up until 2013

1 compels me to find that its disclosure would harm Somet because
2 it includes not just the historical data, but much more current
3 data. And courts have held that the ability to see the
4 movement of prices and strategy as reflected in the movement of
5 prices and as requested by Inter City here in specific
6 transactions would give Inter City a very clear insight into
7 Somet's pricing policies. And I accept Mr. Brosnick's argument
8 it would cause damage to Somet.

9 I'm not sure that I necessarily accept the argument
10 that it would cause damage to the wider marketplace. But I
11 don't really need to reach that issue, because I do find
12 that it is, it would cause damage to Somet.

13 The third question then ends up being does Inter
14 City's need for the information outweigh Somet's need to keep
15 this information confidential. This is a more complicated
16 question. And the answer, the conclusion that I reach is yes
17 and no.

18 The pricing itself is highly relevant to Inter City's
19 theory of the case. At the end of the day their theory is that
20 Somet was able to obtain from STTC and others Michelin brand
21 tires that were outside of what the pricing should have been.
22 They were at the second tier price which was limited to
23 national accounts. And there's at least some proof of that.
24 They reference the November 23, 2010 email from Marshal Oliveri
25 to Mike Gavin at STTC where in it says regarding Michelin

1 tires, whether they, they couldn't purchase those anymore
2 through the national account.

3 So clearly the prices are relevant if Inter City is
4 going to be able to have any fair opportunity at trial to prove
5 that its theory that Somet was able to acquire these Michelin
6 brand tires at an unfairly low price. And as a result of that
7 was able to pass that savings on by selling these Michelin
8 brand tires at prices much less than what any contract called
9 for and what Inter City was able to sell them for.

10 So I do find that that pricing information is highly
11 relevant. I find though that the remainder of the information
12 while marginally relevant, well not marginally relevant, but
13 while fairly relevant is far outweighed by the trade secret
14 designation and the harm that would accrue at a minimum to
15 Somet from its disclosure.

16 As a result of that, here's what I'm going to do.
17 For the period for which computer records do remain and data
18 can be aggregated I'm going to require Somet to produce on a
19 per model, per month basis the average price of each tire.
20 Michelin branded tire.

21 That's the easy part. The harder part, as we've been
22 discussing, and frankly I've been really wrestling with is what
23 to do regarding the 2007 to 2010 records. Because I do agree
24 with Inter City that those prices are relevant. If the scheme
25 is alleged to have occurred then, and certainly the email that

1 Mr. Connolly referenced is a 2010 email, then clearly the
2 logical extension of my reasoning is that Inter City has to
3 have that pricing data for that 2007 through 2010 time period.

4 The difficulty, as Mr. Brosnick pointed out, is how
5 do we go about getting that information to them when the
6 reality is that their computer systems do not still have that
7 data.

8 As we also briefly discussed Rule 45 allows for cost
9 shifting. And I'm going to employ that here. It strikes me
10 that in the interest of trying to balance the undue burden
11 element of this with the need for the information, legitimate
12 need for the information, the use of a third party vendor to
13 help an employee at Somet acquire that information is useful
14 and necessary.

15 The cost of that, as Mr. Connolly volunteered, will
16 be borne by Inter City consistent with the dictate of Rule
17 45(C) that a non-party, which Somet certainly is, not be overly
18 burdened in its obligation to respond to a subpoena.

19 Once that information is culled it won't be provided
20 straightaway to Mr. Connolly. It will be provided to Somet's
21 counsel to insure that the only information being produced is
22 pricing information. It's the raw price, not the customer. So
23 it will be what the Michelin brand tire is and what the price
24 is.

25 That information can be produced in its raw form. In

1 other words on a day-to-day basis. Because unlike the 2012
2 going forward records, that information is dated and although I
3 certainly understand Mr. Cohen's argument that prices haven't
4 moved much in the last five years, there we're talking about
5 information that is seven to, five to seven years old.

6 So what I envision is culling these invoices,
7 redacting all but the actual date, brand of Michelin or type of
8 Michelin tire, and the price. Quantity obviously is going to
9 be a part of that too. But the actual customer and any non-
10 Michelin tire purchases can be redacted.

11 I disagree respectfully but strongly with Mr.
12 Connolly that without knowing the exact customers, or the
13 customer information is so relevant that it outweighs the harm
14 to Somet by producing that. First of all, my survey of the
15 case law on the issue of trade secret suggests that the
16 customer information, and more so than that as sought here by
17 Inter City exactly what those customers bought, when they
18 bought it and what they paid for it is clearly trade secret
19 information.

20 Although he points out that every truck gets a DOT
21 number and there are truck operator lists, that doesn't
22 identify nearly the specific transaction identification or
23 information that he calls for with respect to the customer list
24 and the customer purchases.

25 Moreover, although Mr. Connolly is correct, the

1 plaintiff does not have to go out and interview all of its
2 former customers. It does remain the plaintiff's burden at
3 trial to prove that it lost customers to Somet as a result of
4 this price cutting and it has the ability, or has had the
5 ability to survey those customers.

6 Moreover, with this information it will also be able
7 to show not just what Somet got the tires for, which it already
8 had, and how it got those tires. But what those prices were
9 that Somet sold the tires at along with the information,
10 presumably that Inter City already had, which is its own
11 prices. And customers it continued to have and customers that
12 it lost.

13 That to me seems to be the fair and most balanced way
14 of balancing Inter City's legitimate need for the pricing
15 information to prove its theories at trial with the trade
16 secret protective information here.

17 Logistically, do we have any questions about that.
18 What I envisioned was this. What I envision was in the
19 interest of moving this along give Mr. Brosnick a chance to go
20 back to talk to his folks about that. And give you folks a
21 chance to touch base. And then we talk on Tuesday.

22 MR. BROSNICK: That's fine, Your Honor. I have three
23 questions regarding clarification of the order you just made if
24 I may ask them?

25 THE COURT: No, there's -- I'm sorry. There's one,

1 before we get that, before I forget. One issue I just realized
2 I did not address. The cost of Mr. Brosnick's firm reviewing
3 and redacting is going to also be borne by Inter City. I find
4 that that is the only way because Somet is a non-party to
5 comply with Rule 45(C).

6 Moreover, numerous cases have held that cost shifting
7 may be reasonable and appropriate to offset the otherwise gross
8 inequity of a document production. So as the court noted in
9 Miller v. Allstate, 2009 West law 700142, Western District of
10 Pennsylvania, 2009, although a non-party responding to a
11 subpoena is typically required to pay its own costs of
12 production, under Rule 45(C) the court must take reasonable
13 measures to avoid "imposing undue burden or expense" on the
14 non-party. See, Federal Rules of Civil Procedure, 45(C)(1).

15 To determine whether something constitutes an undue
16 burden or expense the court in Miller instructed I should
17 typically assess, one, the relevance of the information sought,
18 which I've already addressed. Two, the parties need for the
19 production. Three the breadth of the request. Four, the time
20 period covered. Five the request particul-- the particularity
21 of the request. And six, the burden imposed. See, Miller,
22 2009 West law 700142 at page two, citing Moores Federal
23 Practice, Section 45.32.

24 Certainly I should also consider whether the subpoena
25 is directed to a non-party. See, Federal Rule of Civil

1 Procedure, 45, advisory committee note of 1991.

2 Here this is information, one, I find that Somet has
3 already incurred significant time and expense in responding to
4 multiple subpoenas. Two, this is information that at least in
5 part quite rightly Inter City has sought. But, three, it is
6 going to require significant review to make sure that the other
7 information to which Inter City is not entitled does not get
8 produced, which is particularly important. This is far from
9 simply a matter of making sure that Inter City sees only
10 relevant information. It's a matter of making sure that Inter
11 City doesn't see a direct competitor's trade secret
12 information.

13 So in the interest of accommodating Inter City for
14 the information it does need and is entitled to under my
15 analysis, i.e., the pricing information, I am going to require
16 Inter City to pay the reasonable fees for Somet's counsel to
17 review and redact any unnecessary information. What other
18 questions did you have Mr. Brosnick?

19 MR. BROSニック: Beginning with that -- I'm not sure
20 because I haven't seen the records which will be the easier way
21 to do it. But would Your Honor allow the discretion, assuming
22 that it can be done, to whether redact information off of
23 invoices or enter the relevant information, the information
24 Your Honor has determined relevant into a spreadsheet?

25 THE COURT: As long as, well I don't know whether Mr.

1 Connolly has an issue with that. Why don't you folks talk
2 about that. As far as I can see the only problem, potential
3 problem would be is that somebody would have to be prepared to
4 certify it for authenticity sake and reliability sake at trial.

5 MR. BROSニック: That's fair enough.

6 THE COURT: If it's a business record. It's
7 something akin to a business record certification. But that
8 would be the only issue. But obviously Mr. Connolly is the one
9 who's going to be trying the case so his input on that is
10 essential.

11 MR. BROSニック: Okay. Second is Your Honor going to
12 ascribe any value or maybe ascribe any value to the hours that
13 Somet's employees will have to employ?

14 THE COURT: I'm going to deny any request in that
15 regard for this reason. I feel like there's a point where the
16 accommodation impinges on the normal course that even a non-
17 party normally bears its own costs. Here I've already, because
18 in part at Mr. Connolly's suggestion, required, I'm going to
19 require that the third party vendor be paid entirely by Inter
20 City. Certainly, as I've said now, Somet's counsel's fees in
21 reviewing and making sure only the appropriate information is
22 produced is going to be paid by Inter City. To also require
23 compensation of that employee I think would go a step too far
24 towards impinging on the normal process under Rule 45.

25 MR. BROSニック: My last question was putting aside

1 issues of when particular pieces of information are used at
2 trial and what the public nature of that is, subject to
3 whatever Judge Herlong will rule in South Carolina I would
4 request that Your Honor order outside counsel only for this
5 information. So that the information which is still
6 competitively sensitive, even though less so because of Your
7 Honor's ruling, not go to the principals and the business
8 people who are making competitive decisions against Somet.

9 Because it is impossible to unlearn. Even if someone
10 were to swear on a stack of Bibles I won't take that into
11 account, it is not possible for someone to go from a meeting
12 looking at your competitor's prices for particular models
13 still, and then go to the -- and then later in the day be on a
14 call about how you're going to be pricing.

15 And deciding -- and I understand that later at trial
16 there may be, some of that information may be put towards those
17 witnesses on the stand, but that won't be all of it. And so,
18 unless and until it's ordered to be unsealed by Judge Herlong
19 for actual use in trial, I would request that it be outside
20 counsel only at the production stage.

21 MR. CONNOLLY: Your Honor --

22 THE COURT: Mr. Connolly, what's your response?

23 MR. CONNOLLY: -- that would make the information
24 useless and we'll just skip -- there's no way that outside
25 counsel can gain the facility required with dealing with Inter

1 City's vast volume of data and comparison --

2 THE COURT: I've got it. I'm inclined to agree with
3 Mr. Connolly. Particularly because, look, I would certainly be
4 more sensitive to, I think more receptive of that if much more
5 of the information were being turned over. But since all Inter
6 City is going to see now is essentially pricing data
7 disassociated in the aggregate for the most recent information.
8 And more specific but really again only as to product and price
9 for the older information.

10 I think it's completely unreasonable to expect that
11 counsel alone is going to be able to make actual use of that
12 data in preparing for trial given the price cutting theory. I
13 do, the other problem with that is there's simply no provision
14 for attorney's eyes only in the existing third party discovery
15 confidentiality order that you folks have with Judge Herlong.
16 So I'm going to deny that. Yeah, that's essentially it.

17 MR. CONNOLLY: I have a question, Your Honor.

18 THE COURT: Yes.

19 MR. CONNOLLY: The time frame that the Court
20 addressed was that the electronic data would be provided for
21 the extent to which it exists and that --

22 THE COURT: In aggregate form. Yes.

23 MR. CONNOLLY: Yeah. And then the period stated by
24 the Court for review of documents from 2007 through 2010 I
25 understood Mr. Brosnick to say that the electronic database is

1 available from 2012 to date? Is that --

2 THE COURT: Oh. So did I leave 2011 unaccounted for?

3 MR. CONNOLLY: You did.

4 THE COURT: Yeah. I mean that would have to be
5 similarly part of the 2007 up production.

6 MR. CONNOLLY: Okay. So up to the point in time
7 where the electronic data is available.

8 THE COURT: Exactly.

9 MR. CONNOLLY: Yeah.

10 THE COURT: I mean, yeah. I didn't mean to make a
11 temporal distinction as much as a qualitative one.

12 MR. CONNOLLY: Right. Okay.

13 MR. BROSNIK: Your Honor, just so it's not lost on
14 the Court, I understand it will be on Inter City's dime, but it
15 will be on Somet's effort and time. Every month, certainly
16 every year and every month that's added to the produced by line
17 item what price each Michelin tire was sold at makes it that
18 much harder for anyone to, I don't care how many third party
19 vendors are helping, to then go through and produce it anything
20 approaching a relevant. I mean I don't want to undertake to
21 say to my client because Inter City has claims that are going
22 to trial in two weeks you have to shut down your business for
23 the next --

24 THE COURT: No that's not going to happen. What I
25 would hope though is that you have -- look, I'm not going to

1 tell you how to comply with the subpoena or what Somet has to
2 do to comply with the subpoena. If it requires getting more
3 individuals involved on the third party vendor side and then
4 the employee of Somet, who you're going to have do this, you
5 know, oversee them. Then that's what you're going to have to
6 do.

7 I mean it's not an easy situation, but what I've
8 tried to do is also sort of address it as best as possible
9 under the difficult circumstances. I'm not sure what else at
10 this point until that production starts rolling I can really
11 say on that. If there's an issue you folks will let me know.

12 MR. BROSNICK: The only thing I can think of as I sit
13 here and I listened to my client about it is at least the
14 outside vendor who we use to produce the purchase side records
15 has some -- some glance and familiarity of Somet's records. So
16 I would propose to use that again.

17 THE COURT: Okay. Is there any objection of that,
18 Mr. Connolly, since it's in your interest as well to get this
19 up and running as quickly as possible?

20 MR. CONNOLLY: That's something I'm certainly
21 prepared to talk to Mr. Brosnick and my client about.

22 THE COURT: All right. You folks will talk. I've
23 got to tell you, if it helps move those discussions along, it
24 makes a lot of sense to me and I don't see the downside to Mr.
25 Connolly or to Inter City from that. All right. If there's

1 still an issue, you folks will let me know next week. Okay.

2 Lets turn to the -- lets actually turn to the
3 30(B)(6). I know we said we were going to do the Chase
4 subpoenas first. But I think to some extent on the 30(B)(6) I
5 can -- have you folks had any further discussions about this?
6 Here's my thought.

7 Number one, the sheer number of topics is alarming to
8 put it bluntly, Mr. Connolly. I mean you are talking about 22
9 sort of mini-categories, but within several of those we've got,
10 well judging from the fact that we get into DD 30 subcategories
11 and one and 30 subcategories in another. That's 13 and 14.

12 So, look, you know, in part clearly it's in your
13 interest to get this done as expeditiously as possible. Have
14 you folks had any more discussions about trying to narrow this
15 down or limit, or agree on the parameters of the 30(B)(6)? And
16 one of the things I wonder is why couldn't that information or
17 the scope be limited to the same topics that for which the
18 subpoena duces tecum, the subpoenas have been complied with?

19 MR. BROSnick: Your Honor, that is what we offered
20 before the motion to compel. That was our offer that was
21 summarily rejected. Or, excuse me, was, that was our offer
22 that said okay, respondent says okay, we'll take what you're
23 offering but we reserve all our right to go to the Court and
24 get everything else.

25 THE COURT: Uh-huh.

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1 MR. BROSNICK: At this point, Your Honor --

2 THE COURT: Oh, is that the issue that you folks
3 nearly, but didn't ultimately resolve last week, or on Tuesday?

4 MR. BROSNICK: No. That was a little bit different
5 issue. Yeah.

6 THE COURT: That was a different issue we nearly but
7 didn't actually resolve. Okay.

8 MR. BROSNICK: But the idea of now after having gone
9 through all this, all the motion practice, all the burden even
10 without huge expense will still be a substantial burden to get
11 this production done. The idea of then, presumably at some
12 point after that, having to produce multiple witnesses to
13 address even all of those documents.

14 I mean at the very least, even if it were narrowed to
15 the production prior, we were talking about a minimum of two
16 witnesses. One of whom is out of the country for some period
17 of time. I'm just not sure how it could be done. There's
18 really two separate parts. There's the burden of doing it and
19 then there's the question of, you know, if you asked me to lift
20 40,000 pounds, yes, it would be a burden, and I just couldn't
21 do it.

22 THE COURT: Right. Well wait. Are you saying, are
23 you saying that somebody cannot give deposition testimony, not
24 according to the 30(B)(6) notice as issued now. But if it were
25 limited to the materials produced, you're saying that that's

1 impossible?

2 MR. BROSNICK: I'm saying if it was limited to the
3 materials that were produced in November, the upstream --

4 THE COURT: Well as well what I've just ordered
5 produced, although it sounds like that production is going to
6 be ongoing while this deposition happens. So I'm not sure --

7 MR. BROSNICK: That's another, that's part of the
8 impossibility because we're talking about that's going to take,
9 I don't know how long it's going to take.

10 THE COURT: Right.

11 MR. BROSNICK: It's not going to be next week. The
12 idea of someone getting up to speed on that and being prepared
13 to testify. And lets take even just the upstream. Even just
14 the upstream information it would require a minimum of two and
15 possibly three witnesses to cover all of that. Previously, and
16 I guess should ask is it okay to mention what we discussed in
17 the --

18 THE COURT: Sure.

19 MR. BROSNICK: Okay. Previously we had discussed
20 electing only one employee who would know more. That
21 unfortunately is the employee who's going to be out of the
22 country for a good chunk of the rest of the month on business.
23 So it might end up having to be the other employee.

24 THE COURT: Well you could do a video conference dep,
25 couldn't you?

1 MR. BROSNICK: He's in China. I'm not sure what the
2 feasibility of that is. I honestly don't know. The other
3 employee I'd have to check, I don't know what her status is.
4 The other employee is Ms. Oliveri who -- the documents, who
5 knows a lot about the accounts payable.

6 She won't know as much about the pricing so it
7 becomes kind of a -- and then there's all the time to review
8 and get up to speed and educate and so forth.

9 If it were converted from a 30(B)(6) to a deposition
10 of a particular individual such that the person might be able
11 to say I don't recall that without violating the subpoena, then
12 certainly the prep time burden would be eased. But these are
13 all, those are logistical -- and then I'm sure Michelin has
14 something to say about the idea of how quickly that could
15 happen and what the idea --

16 And then on top of that question to Mr. Connolly,
17 will these same people be called at trial? Because if they
18 will the burden to a non-party I respectfully suggest why not
19 just, you know, do it -- they're the ones who --

20 THE COURT: Oh, a de bene esse?

21 MR. BROSNICK: Excuse me?

22 THE COURT: Were you proposing a de bene esse? In
23 other words take the deposition and use it as trial testimony?

24 MR. BROSNICK: Either that or just --. But, yeah.

25 THE COURT: Well, my guess is, and it's just a guess,

1 is that Mr. Connolly is not going to agree to that.

2 MR. BROSニック: But I would at least agree that it
3 ease the burden somewhat if the deposition testimony were the
4 trial testimony. So you wouldn't have Somet employees being
5 burdened by having to testify twice in a two, three, or four
6 week stand.

7 MR. CONNOLLY: Well we don't have subpoena power to
8 compel Somet's employees to come to South Carolina. So that's
9 easy.

10 THE COURT: There is that.

11 MR. CONNOLLY: There is that.

12 THE COURT: All right.

13 MR. CONNOLLY: Your Honor, I, if Mr. Brosnick agrees,
14 I think it might serve all of the parties and the Court's
15 interest if we take a recess and I go over the list of 30(B)(6)
16 topics with Mr. Brosnick.

17 THE COURT: I think that's a great idea.

18 MR. CONNOLLY: And we try to work out a feasible way
19 of getting that done.

20 THE COURT: I think that's a great idea.

21 MR. CONNOLLY: Okay.

22 MR. BROSニック: Before we go any further I know my
23 client won't agree to anything unless -- well if they're
24 ordered to I guess they'll have to. But, I'll put it out
25 front. They're going to make the same request about cost

1 shifting on this. Because it's going to be the same issue of
2 even more time. And this time unlike most of the going through
3 line items will be my time.

4 THE COURT: Uh-huh.

5 MR. BROSNICK: And, you know, I hesitate to send them
6 January's bill with this monthly bill.

7 THE COURT: Okay. Well lets -- we'll, I'm not so
8 sure on that cost issue as I was about the last one because a
9 30(B)(6) as to a Somet rep was I think fairly inevitable. I
10 mean it's happening now. But it's certainly not outside the
11 pail of discovery. But that all obviously presupposes that
12 ultimately the subpoena is cut, the subjects are cut down to
13 something that I would regard as reasonably accomplishment.

14 MR. BROSNICK: I mean part of the problem, and this
15 more my commentary and I apologize in advance, this whole
16 process encourages what happened in this case, frankly. It
17 tells me that I -- practice, but it tells attorneys go on a
18 fishing expedition. Worse case scenario --

19 THE COURT: Well I mean, look, I understand Mr.
20 Brosnick. But I'm certainly not going to agree to a fishing
21 expedition. So, look, you folks put your heads together and
22 then when you're ready, take all the time you need. You can
23 take the jury conference room if you want.

24 Do we need to -- look, if counsel on the phone wants
25 to stay on, you're more than welcome to. At least from where

1 the Court stands I don't need to detain you anymore than you
2 need or want to be.

3 MS. FENNELLY: Your Honor, this is Kathleen Fennelly
4 and Mr. Herzog our apologize to the Court having dropped off.
5 He made a prior commitment. I would just like to reach out to
6 him and see what his thoughts are.

7 THE COURT: I'll leave it to you folks. But all I'm
8 saying is if anybody, I don't know if Mr. Lasala is on. If
9 anybody needs to move on to other things it's not a problem
10 from where the Court stands. So, and if you want to stay on
11 that's fine too.

12 So we're going to go off the record. We're going to
13 take a recess. And when you folks are ready, Mr. Brosnick, Mr.
14 Connolly, you'll let me know. Okay.

15 MR. CONNOLLY: Thank you, Your Honor.

16 THE COURT: All right.

17 MR. LASALA: Thank you, Your Honor.

18 THE COURT: Thank you.

19 MS. FENNELLY: Thank you.

20 (45 minute recess.)

21 THE COURT: All right. We are back on the record in
22 the Michelin Inter City matter. Mr. Brosnick, did you want to
23 put something on the record?

24 MR. BROSNICK: Yes, Your Honor. At the end of Your
25 Honor's order when we were trying to clarify what documents and

1 how they would be produced, what information and how it would
2 be produced, Your Honor in response to Mr. Connolly's
3 observation, I think, if I understood you correctly, changed
4 the original order to say that line item per transaction
5 pricing would be produced up until the time when electronic
6 discovery --

7 THE COURT: Yeah. I did not -- if you infer from
8 that a change, I certainly didn't intend to change. Look, in a
9 perfect world you'd be able to aggregate all of the data. But
10 because of limitations of Somet's computer system you cannot.
11 So for that which you can aggregate and produce in the
12 computerized form, fine. For that which you can't I don't see
13 an alternative.

14 MR. BROSNIK: What I'm saying, what I thought Your
15 Honor's rule was that in the older data it's not as
16 competitively sensitive and so it's okay to have line item.
17 But when you get into 2011, 2012, at some point in 2012, that
18 data, at least according to Mr. Cohen's unopposed,
19 uncontradicted testimony, is still competitively sensitive.

20 So I would respectfully request if -- that the order
21 be line item through 2010 and then even if we have to do it --
22 once you manually enter it into a spreadsheet or manually get
23 all of the line items the work involved in then aggregating it
24 is another hour. So I would say for 2011 and whatever portion
25 of 2012 before they start having electronic data if you

1 aggregate it and provide it on the monthly list, as the
2 electronic option.

3 THE COURT: Mr. Connolly, do you want to be heard on
4 that?

5 MR. CONNOLLY: It's only meaningful if we can get to
6 the pricing per unit, Your Honor. I don't know what the
7 aggregation that he's talking about is going to look like.

8 THE COURT: The aggregation he's talking about
9 essentially would be on a per month, per model basis. Same as
10 for going forward what the pricing was. It's exactly what's
11 going to be produced for example for 2013. And I assume all of
12 2012.

13 MR. BROSNICK: Well not, as I stand here, Your Honor,
14 I'm not sure --

15 THE COURT: Whatever the computer records allow for.

16 MR. BROSNICK: -- how far back it goes. If it goes
17 back to -- it goes back to some point in 2012. But I'm not
18 sure when.

19 MR. CONNOLLY: We would prefer the specific line item
20 pricing, Your Honor. That's what's available in the documents
21 and frankly that's what allows for an apples to apples
22 comparison.

23 THE COURT: Okay. I have considered the parties'
24 arguments on this issue. And for the reasons I articulated
25 earlier I'm going to grant Somet's request. I was unaware that

1 that could be converted to an aggregation point. I'm certainly
2 more comfortable with that, particularly because as Mr. -- as
3 defense counsel rather noted -- strike that.

4 As Mr. Cohen, what I meant to say earlier, not Mr.
5 Brosnick, as Mr. Cohen noted in his declaration, affidavit
6 rather, that information including back to 2011 is in fact
7 sensitive. He points out for example that in discussing the
8 prices, for example, paragraph 13 of his affidavit he groups
9 the 2011 data largely with the 2012, 2013 data.

10 For the reasons I've already articulated I find
11 information produced in that form is evidently consistent with
12 what I've already determined is sufficiently necessary for
13 Inter City to present its case here beyond the restrictions of
14 the fact that it's trade secret information.

15 So, I will allow the 2007 data forward to be produced
16 in the aggregate form. For anything before 2011, that will be
17 produced in the redacted line item form.

18 All right. What did you folks conclude by way of the
19 30(B)(6)?

20 MR. BROSNICK: Your Honor, let me start with, I feel
21 like there are three -- before we dive into the granular, there
22 are three issues. First, I'm going to reiterate for the record
23 and in case my client decides to appeal, we believe that, Somer
24 believes that having to sit for a deposition after all of this
25 is going to be, is an undue burden and the subpoena should

1 simply be quashed. That's -- to the extent there is any, going
2 to be any deposition, the burden objection, a large part of
3 where the burden comes from, and this came out of the meeting
4 Mr. Connolly and I just had, comes from the idea that no one
5 Somet employee knows a lot of this. And in many cases, I
6 suspect, and some cases I know, no one really remembers what
7 the issue was for that 2008 transaction.

8 So having this be a 30(B)(6) deposition imposes the
9 burden of having to do a lot of document review and then have
10 individual people educate one person, or produce multiple
11 witnesses.

12 What I propose, if there's going to be any
13 deposition, is to pick one person who is most knowledgeable
14 about the most of the subjects and make it a deposition of that
15 person. Such that if that person doesn't -- if the person --

16 THE COURT: So it's a personal knowledge deposition.

17 MR. BROSNICK: Right. So, for example, if what is
18 most important is the, you know, the purchases of Michelin
19 tires or the use of the credit cards, then someone who knows
20 about that, but that person may not know about, you know, why
21 that transaction or whose handwriting that is on a particular
22 2009 invoice. You know, or what relationship Somet might have
23 had with one of the 38 entities that's listed in all the sub-
24 items.

25 THE COURT: Uh-huh.

1 MR. BROSNICK: And just for completion. The third
2 one which kind of dovetails with the second is timing. We're
3 going to need at least according to how I understand Your
4 Honor's order, Somet has been ordered to undertake a pretty
5 mammoth information document review and production.

6 The idea of, and then depending on how two comes out,
7 if it's 30(B)(6) or an individual, and equally burdensome
8 education process and further review is specific. The idea of
9 trying to do this on a time frame of a week or two is going to
10 be an even greater burden.

11 THE COURT: All right. So what is Inter City's
12 response to that?

13 MR. CONNOLLY: Your Honor, as a result of the meeting
14 that we just had we've eliminated 12 of 22 categories. And one
15 of the remaining ten categories I think is going to be fairly
16 limited. The remaining ten categories also are largely
17 duplicative of category one, which is a category concerning the
18 transactions reflected on the documents produced by Somet in
19 connection with the October 3 subpoena.

20 But as to that narrowed field of topics, Your Honor,
21 we would like a 30(B)(6) representative who can address those
22 subjects. And what I would encourage the Court to do is to
23 walk through what remains so that the Court can see that we're
24 not looking for a what will necessarily be a large number of
25 individuals testifying or a huge burden to be imposed upon

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1 Somet Tire in responding to this 30(B)(6) deposition. We do --

2 THE COURT: All right. So why don't you just give me
3 by number what's left.

4 MR. CONNOLLY: Okay. Two.

5 THE COURT: Okay.

6 MR. CONNOLLY: Three.

7 THE COURT: Okay.

8 MR. CONNOLLY: Four.

9 THE COURT: Okay.

10 MR. CONNOLLY: Six.

11 THE COURT: Okay.

12 MR. CONNOLLY: Eight. And then let me come back to
13 nine because that's something that I need to explain to the
14 Court what we need. And it's less than what's stated here.

15 THE COURT: Well it's going necessarily be because
16 it's already been ruled on by virtue of the subpoena duces
17 tecum.

18 MR. CONNOLLY: Right. Exactly. But, if we can pause
19 there for a moment, Your Honor, one thing that was not clear to
20 me from the Court's order as to the electronic data that will
21 be produced --

22 THE COURT: Yeah.

23 MR. CONNOLLY: -- the Court said that Somet is
24 ordered to produce an average price.

25 THE COURT: Yes.

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1 MR. CONNOLLY: We request that that be a weighted
2 average price.

3 THE COURT: I don't know what that means.

4 MR. BROSNICK: Your Honor, I'll tell you exactly what
5 it means. It means exactly what Mr. Cohen testified and what
6 we fear. When we were in there, Mr. Erbesh was able to say,
7 well if I know the quantity and I know the price, then I can
8 derive what their total sales were and their revenue. It's
9 exactly what we feared. It's the --

10 THE COURT: Wait, wait, wait. Don't characterize it.
11 It's confusing enough. What does it -- how would one -- if for
12 example it was a per unit, what I had in mind was a per tire
13 price, average per month per brand, or per line of Michelin
14 tires.

15 MR. BROSNICK: If I give you, lets say because I'll
16 use realistic numbers, if I give you 4,000 invoices, some of
17 those invoices are going to say six tires. Some of them are
18 going to say nine tires. Some of them will say two, some of
19 them will say 20.

20 If we could -- the granularly much more burdensome
21 way to do it that Mr. Connolly is suggesting is to take each
22 invoice's average price and then make a weighted average so
23 that you're not just talking about 4,000 invoices, you're
24 talking about each tire on each invoice. So it's something
25 like 20, 30, 40,000. I don't know how many thousand.

1 The other way to do it, which is directionally
2 accurate but not as mathematically precise, and not as capable
3 of being reversed engineered by someone with knowledge, is to
4 just take the invoice price of each and then average all of
5 those because --

6 THE COURT: On a per unit basis. Right?

7 MR. BROSNICK: On a per unit basis, but an average
8 per unit.

9 THE COURT: Yeah.

10 MR. BROSNICK: So it wouldn't be weighted. So that
11 the average would be less precise because an invoice for four
12 tires would have been given equal weight to an invoice with
13 seven tires. So in theory if you were going to weight it the
14 seven one should have been counted 1.75 times or 1.78 times as
15 much as the one with four tires.

16 But what I'm submitting that the burden of doing that
17 would be substantially greater. And at the end of the day you
18 will come to the difference in the end, because most of these
19 companies don't -- it's not like one is buying 20,000 tires and
20 the other three. You're talking about four, seven, twelve, you
21 know. Over the course of looking at all the invoices it's
22 going to be more or less not the same, but it will be in the
23 same zone.

24 THE COURT: All right. I'm going to deny Inter
25 City's request. This production is complicated and challenging

1 enough and is on a very short time frame given the trial date
2 without going --. Plus I'm not so sure based on Mr. Brosnick's
3 representation that there would be that much of a fall off
4 between the average per unit price, which I envisioned, and the
5 weighted price.

6 It would be one thing as Mr. Brosnick points out if
7 in any given month say for one particular type of tire there
8 was one sale for \$30,000 with one per unit price. And then two
9 sales each of four tires at a different per unit price.

10 But in any event, in the interest of moving this
11 along with a realistic eye towards getting this discovery done
12 by the trial date and without unduly burdening Somet, I'm going
13 to deny the request. Okay. So where are we back on the Rule
14 30(B)(6)?

15 MR. CONNOLLY: Okay. So we're up to eight is
16 included. Twelve, thirteen, fourteen, and twenty-two.

17 THE COURT: Give me a second just to review those.

18 (Brief pause.)

19 THE COURT: Here's a concern I have with your
20 proposal, Mr. Brosnick. If I were Mr. Connolly I would
21 essentially say, Judge, how do I know I'm not setting myself up
22 for Somet to put up somebody with only a at best gauzy
23 understanding of these particular subjects that we've narrowed
24 this down to and I'm going to be stuck with what I get.

25 In other words it's a fairly significant fall off

1 from the 30(B)(6) standard to what you're proposing. Now it
2 may be one thing if, for example, Mr. Cohen, for example, could
3 reasonably be assumed and based on the documents to have at
4 least sufficient familiarity with these issues such that even
5 if he is limited to testifying in his personal capacity, Inter
6 City could be reasonably assured that it's going to get not
7 necessarily all of the information its looking for, but at
8 least some critical mass of that information.

9 MR. BROSNICK: I understand, Your Honor. It wasn't
10 my suggestion that I would encourage Somet to play games and
11 put up a --

12 THE COURT: I'm not suggesting that you were. I
13 didn't mean to suggest that for a moment.

14 MR. BROSNICK: The way around that, I think, would be
15 for me to go back to Somet, subject to individuals being
16 present there and available, to propose three individuals and
17 kind of give a thumbnail of what they generally know. And kind
18 of let, taking into account -- my concern is, and I'll use Mr.
19 Cohen as an example. Mr. Cohen, I know, would be knowledgeable
20 about, you know, the relationship with some of the people, like
21 for example in number 13, communications with Bill McCabe who
22 figures in the underlying case. But he's not going to be able
23 to identify whose handwriting is on invoices. And he's not
24 going to know why a credit card was used on a particular
25 transaction.

1 Conversely, you could probably go to Somet's accounts
2 payable person, Marshal Oliveri, and she'll probably be able to
3 identify most of that handwriting. And she may even remember
4 about why a credit card was used on that transaction. But
5 she's not going to know about why a particular program was
6 negotiated or about some communications with particular people.

7 And I don't want, I want to avoid -- and then either
8 of them or the records person, a third person, may not remember
9 things so clearly from 2007, '08, '09, '10, who knows.

10 And what I want to avoid is one, having to have one
11 person educate the other person and spend all of the time doing
12 that. Then two, whoever it is go back into the bowels of the
13 records to educate themselves about that which no one
14 remembers. You know, if you asked me to testify about a case I
15 handled in 2008 I'd have to spend a lot of time getting up to
16 speed. Even though I actually would probably still be the best
17 person to do it.

18 So that's why, without game playing, and with
19 identifying the three or at most four potential witnesses, I
20 would suggest saying, it will basically, as I said to Mr.
21 Connolly in the room, you can get almost anything you want, but
22 you won't be able to get everything you want. So pick someone
23 who knows the most and then go with that person and accept that
24 that person won't remember, I don't know, or won't remember
25 other things.

1 THE COURT: All right. Here's what I'd like to do on
2 this. Mr. Connolly, do you think that if Mr. Brosnick got back
3 to you on say Tuesday or Wednesday with the names of people who
4 could, based on personal knowledge, address the specific items
5 that you have reduced the 30(B)(6) down to, that you would have
6 some basis based on your familiarity with this case and the
7 documents to know whether, who those individuals are and
8 whether you agree, how probably based on the documents would
9 know this particular area? Here's my concern --

10 MR. CONNOLLY: Yeah. I mean I think I would take at
11 Mr. Brosnick's representation.

12 THE COURT: Yeah. It's certainly not in Mr.
13 Brosnick's interest, first of all he's, you know, he clearly is
14 an upmost professional and I certainly didn't mean to suggest
15 anything to the contrary earlier. But frankly it's also in his
16 self interest to try and get, and his client's self interest to
17 get this done as efficiently as possible rather than run the
18 risk of you folks coming back to me or to Judge Herlong.
19 Because --

20 MR. CONNOLLY: We share that interest. We want this
21 done efficiently.

22 THE COURT: Sure. Of course. Especially maybe
23 nobody more so because you've got trial in two weeks which
24 leads me to the other point. I have real concerns about this
25 30(B)(6) not just in terms of the undue burden on Somet. Look,

1 if we were talking about, you know, a year before trial or even
2 six months before trial, that would be one thing because I
3 would say look take one 30(B)(6), or this witness, and then
4 come back and let me know if, you know, you feel for example
5 that there's still other areas that you have to have that
6 hadn't been adequately covered.

7 But the reality is here you've basically got two
8 weeks at most. So the idea that it's realistic, I don't think
9 it's at all realistic that any one or several people even can
10 get completely up to speed on this many different subjects,
11 even as reduced down, sufficient so that everybody would be
12 sure that ever corner of Rule 30(B)(6) is met. I just don't
13 know that under these circumstances that is entirely realistic.

14 And also cannot overlook the fact that, you know, you
15 folks are going to be busy, particularly Somet with respect to
16 complying with the last subpoena that we dealt with.

17 So here's what I'm considering doing. I'm
18 considering Mr. Brosnick's suggestion that there be one or
19 perhaps two individuals who are put up to testify in their
20 personal capacity in lieu of the 30(B)(6).

21 I think that particularly with these time constraints
22 that is far more realistic in terms of what the parties can
23 accomplish than just sort of blithely ordering, you know, a
24 30(B)(6) witness or witnesses somehow in the next two weeks to
25 get up and testify and be completely up to speed on these

1 various topics.

2 I certainly appreciate Mr. Connolly's and Inter
3 City's attempt to cut the subpoena scope down. But the fact is
4 that still you're talking about a lot of material. I'm not
5 saying it's, you know, beyond a pail or irrelevant, but just on
6 the face of it. For example, communications between anybody
7 from Somet in 13, and 30 different people. Communications
8 between, or payments rather between Somet and any of 30
9 different individuals. Those two in and of themselves are,
10 could involve becoming familiar with a substantial amount of
11 material.

12 So here's what I'd like to happen. Mr. Brosnick is
13 going to go back with these identified reduced topics in hand
14 and talk to his folks about -- well do you think, Mr. Connolly,
15 that it would be possible to, if you had to narrow it down even
16 further to must haves in light of the fact that you've got two
17 weeks to do it, that that would be possible? All I'm thinking
18 is in the interest of trying to move this along.

19 The other thing I could do is simply require Mr.
20 Brosnick to go back and go, this person can testify about these
21 particular areas. This person can testify about these
22 particular areas from personal knowledge. And then you pick.

23 MR. CONNOLLY: Pick one? Or pick two?

24 THE COURT: Depends on, I can't say that yet because
25 it depends on for example whether a particular -- if every one

1 person is every topic is going to be only one person such that
2 -- I'm sorry. Strike that.

3 If it's going to be a different witness for every
4 single topic, then we're going to be talking about taking more
5 than one. But if hypothetically for example a particular
6 witness can testify about some significant sum of those, then
7 it would be a lot more receptive to that one person. So I
8 can't answer that yet until I know what Mr. Brosnick comes back
9 with.

10 MR. BROSNICK: Your Honor, it's going to be the
11 latter. The people who know about something. There's also
12 another wrinkle to this. I mean, Your Honor, looked at number
13 13, which I agree is a good example. There may be someone who
14 has a good idea about what Somet deals with these people in an
15 accounts payable concept, but maybe not in a customer service
16 kind of go out to a ball game concept. And so you wouldn't be
17 able to cover all angles of it.

18 THE COURT: Right. So we're going to need to get, so
19 I cannot -- there's no way I'm going to commit at this point to
20 whether it's one or more than one deposition until I see what
21 that list is. But quite frankly I really do think that that is
22 exactly why it's in Inter City's interest to speak with Somet
23 counsel about what specifically is the most significant in
24 terms of the information for the deposition. And that way it's
25 narrowed down to where it becomes a lot more feasible to get it

1 done in one or two. All right.

2 And then how are you going to need to get this
3 together? Should we be talking again like Thursday?

4 MR. BROSNICK: I think so. Honestly I have no idea.
5 While Mr. Connolly was conferring with his client I emailed the
6 principals at Somet and asked them. I normally try not to
7 schedule client calls on a weekend.

8 THE COURT: Yeah.

9 MR. BROSNICK: I asked them, tomorrow I have
10 something with my daughter, I asked them if they could do a
11 call on Sunday. Sunday is a work day in Israel at least and I
12 know one of them will be working.

13 THE COURT: Okay.

14 MR. BROSNICK: So I'll know more next week. The file
15 clear I spoke to at the last break was stunned and didn't even
16 know how to start to go about it. So I need to plum this and
17 figure out how it can be done.

18 THE COURT: All right. So why don't we do this.
19 We'll talk, oh, wait, Thursday I can't do it. How about
20 Friday. All right? By that point you folks should know either
21 you can work this out in a way that makes sense or you can't.
22 So lets talk Friday at 10:00 a.m. on the phone. Does that make
23 sense.

24 MR. BROSNICK: That's fine, Your Honor.

25 THE COURT: All right. All right. Chase subpoenas.

1 Chase and J.P. Morgan. Lets get this part done. Here's my
2 first question. So we've got the Chase subpoena and the J.P.
3 Morgan Chase subpoena. Referencing the J.P. Morgan subpoena,
4 do I have jurisdiction under Rule 45 to consider that subpoena
5 and whether to enforce it? It has a return address in Boston.

6 MR. CONNOLLY: What I'm looking for, Your Honor, is
7 to see if it was served on a corporate agent.

8 THE COURT: Well it does say, that's what I was
9 wondering too. Because it does say care of C.T. Corporation
10 System. But that, I can't tell whether the Boston address
11 refers to J.P. Morgan or C.T., or for some reason both. I
12 honestly can't tell.

13 MR. CONNOLLY: I believe that this was served on C.T.
14 Corporation in Boston.

15 THE COURT: All right. So I don't know what I can do
16 with that one. I mean that's not a discretionary issue either,
17 as I understand it. Why don't we do this. A lot of the
18 issues, I think, probably overlap in any event. So --

19 MR. BROSNICK: It's that one that is the broader. I
20 think the accurate way -- to say, the second Chase subpoena
21 includes and then adds a lot more.

22 THE COURT: Because it adds additional counts.

23 MR. BROSNICK: Additional counts, and additional
24 things being requested.

25 THE COURT: Yeah. Well unless somebody can show --

1 look, all I see on there is a Boston address which Rule 45 very
2 clearly says --

3 MR. BROSNICK: The only thing I can say and I
4 honestly haven't researched the jurisdictional element, but
5 since we're talking about Somet and its employees records, we
6 could say that even though they're in the custody of Chase they
7 are, that they are Somet's records. I -- on that one.

8 THE COURT: I think we're getting a little -- I'm
9 afraid we're getting a little cute with Rule 45 there. Look,
10 here's what I'll do. I'm going to hold off on dealing with
11 anything on that now. You folks think you can resolve the
12 issue and come back and pitch me on how I have jurisdiction I'm
13 more than happy to hear you.

14 I'm just not, as a Magistrate Judge, not inclined to
15 rewrite, you know, several centuries of federal jurisdiction.
16 While I certainly understand what you're saying, Mr. Brosnick,
17 and it has some facial appeal, but I'm afraid it starts to get
18 a little cute with Rule 45.

19 That has us then dealing with the Chase subpoena.
20 The one I'm talking about specifically was the subpoena to
21 Chase Bank on November 25th for banking records. There are
22 five items. Account origination documents for a particular
23 account, all records for that account for the period of January
24 1, 2006 to the present. Item number three is all records
25 regarding all accounts at Chase for January 1, 2006 to the

1 present held by Yuhiel (phonetic) Cohen, Hali Cohen (phonetic),
2 Somet Tire, including but not limited to bank statements,
3 debit, credit, deposits, withdrawals, cancelled checks front
4 and back.

5 Item number four is all communications with Michelin
6 North America and a Visa regarding any of those accounts.
7 Presumably that would be already encompassed with item number
8 three. And item number five is any and all accounts regarding
9 the Michelin advantage card accounts held by the Cohens or
10 Somet. It strikes me again probably encompassed by item number
11 three. But in any event.

12 So let me hear from you Mr. Connolly. The first is,
13 well I don't expect you obviously to identify the account
14 number. What is that account generally and how is it any
15 different than what you're looking for with regard to Yuhiel
16 Cohen, Hali Cohen, and Somet in item number three?

17 MR. CONNOLLY: May I have a moment, Your Honor?

18 THE COURT: You take all the time you need.

19 (Brief pause.)

20 MR. CONNOLLY: -- substantially reduce the scope of
21 this.

22 THE COURT: Okay.

23 MR. CONNOLLY: The credit card number that is
24 referenced in this subpoena, the account number that's
25 referenced in this subpoena is a credit card account.

1 THE COURT: Okay.

2 MR. CONNOLLY: And what we're interested in are the
3 statements during the relevant time frame for that account.
4 That's it. And then as to request number five, well just
5 getting back to the first one. That would mean that we could
6 essentially limit our request to item two for the time frame
7 referenced and the account referenced, and limit it to
8 statements. Monthly statements.

9 THE COURT: Okay.

10 MR. CONNOLLY: And then --

11 THE COURT: What about item three?

12 MR. CONNOLLY: We don't need three or four. And as
13 to five the Michelin advantage card accounts held in the name,
14 it says the above referenced individuals and entities.

15 THE COURT: Yes.

16 MR. CONNOLLY: The relevant names and entities would
17 be essentially two names for the same person, Yuhiel Cohen,
18 Hali Cohen, or Somet Truck Center, New Jersey, LLC.

19 THE COURT: So all right. So item number five seems
20 to be pretty much intact then. Right? That's basically what
21 it was before.

22 MR. CONNOLLY: It is. It is.

23 THE COURT: Okay.

24 MR. CONNOLLY: But just to clarify that's
25 specifically what that refers to.

1 MR. BROSNICK: Sorry, I guess --

2 THE COURT: So here's what we're down to then. Item
3 number two, but it would just be basically the credit card
4 statements for that particular account number for that period
5 of January 1, 2006.

6 MR. CONNOLLY: We could limit it through April of
7 2013.

8 THE COURT: Okay. And then the only other item is
9 essentially item number five. It's Yuhiel and Hali Cohen and
10 Somet for item number five.

11 MR. CONNOLLY: Right.

12 MR. BROSNICK: Respectfully, Your Honor, number five
13 encompasses everything in one through four and --

14 THE COURT: No, no, no. He's offering to modify it.
15 Essentially what he wants known item number five is any and all
16 basically credit card statements, if I understand correctly,
17 for Michelin advantage card account held by Yuhiel Cohen, or
18 under the name of Hali Cohen, or Somet for the, limited though
19 to the Michelin advantage card.

20 MR. CONNOLLY: That's it.

21 THE COURT: So that's different it seems to me than
22 the prior request.

23 MR. BROSNICK: But in asking only for statements, or
24 all documents related to that card?

25 THE COURT: It's not asking --

1 MR. BROSNICK: All documents related to that card.

2 THE COURT: Is that -- hold on. Is that account, the
3 account number, the unidentified account number, is that
4 different than a Michelin advantage card or the same?

5 MR. BROSNICK: I don't know, Your Honor. We
6 weren't --

7 THE COURT: Well I'm asking him.

8 MR. BROSNICK: Okay. We weren't served with the
9 subpoena.

10 MR. CONNOLLY: I, as I sit here, Your Honor, I don't
11 know. There are a number of credit card numbers that are in
12 the documents produced by Somet. At least one of them is a
13 Michelin advantage card. And I don't know if this is that one.

14 MR. BROSNICK: Your Honor, harkening back to what Mr.
15 Connolly and I discussed on Tuesday that we were unable to work
16 out a global deal, hopefully it will help us avoid the
17 jurisdictional issue, what I would least take back to Somet and
18 propose, if we could narrow this -- the primary problems with
19 this on the credit card side is it asks for the entire
20 statement which goes to a whole lot of other stuff.

21 THE COURT: Yeah. I'll be honest with you. I have
22 real concerns about, particularly if, you know, if he's, if
23 he's using it for personal expenses it's really, really
24 invasive.

25 MR. BROSNICK: And then the other aspect is that it

1 goes beyond Somet. It goes to a person. If this were --

2 THE COURT: It's going to a principal.

3 MR. BROSNICK: Yes. Yes. If this --

4 THE COURT: So that I'm a little more receptive to in
5 the capacity though of operating at Somet. In capacity of
6 operating as, you know, do you know Cohen private citizen who
7 just uses it to go the movies, for example?

8 MR. BROSNICK: I'll go a step further. Here's what I
9 would propose. If it's -- I don't know the answer to this as I
10 say, but I'm going by my own history of having had a corporate
11 card at a number of different firms, and I used the same card
12 to buy my, to pay for my car here as I do to pay for my wife's
13 birthday present.

14 Because, and I think on point because I have points
15 on it, I think that's roughly the case here.

16 THE COURT: Right.

17 MR. BROSNICK: But if this request and not within
18 Your Honor's jurisdiction arguably but the other -- and also if
19 it were narrowed to Michelin advantage cards in Somet's name or
20 Mr. Cohen's name. And the statements came to me and then I
21 redacted all but things that show the line item of Michelin
22 tire purchases, I would propose that to my client as a
23 reasonable --

24 MR. CONNOLLY: I'm completely fine with Mr. Brosnick
25 screening the statements and redacting everything but Michelin

1 transactions. Or Service Tire transactions. Service Tire or
2 Michelin. I'm fine with that.

3 MR. BROSNICK: Well Service Tire for Michelin Tires,
4 or Service Tire for anyone?

5 THE COURT: Michelin. That's the theory of the case.

6 MR. CONNOLLY: Yeah. But you can't tell from a
7 credit card statement what's being purchased. You see the
8 vendor and it doesn't list the products that are purchased.

9 THE COURT: Well then how are you going to know if
10 it's part of the scheme?

11 MR. CONNOLLY: Because we've got a lot of documents
12 from Service Tire. So there's the ability to cross reference.

13 THE COURT: That's pretty reasonable.

14 MR. BROSNICK: Fair enough.

15 MR. CONNOLLY: But I don't think that the scope
16 should be limited to only the Michelin advantage card, which I
17 understood Mr. Brosnick to say, because there were other credit
18 cards used that are the subject of these subpoenas that are not
19 Michelin advantage cards, but which were used to purchase
20 Michelin tires.

21 THE COURT: Well all right. Hold on. Lets just deal
22 first with the Chase subpoena.

23 MR. CONNOLLY: Okay. So I'm fine with --

24 THE COURT: What's that other account number though?

25 MR. CONNOLLY: I have a --

1 THE COURT: The one that's redacted, you know --

2 MR. CONNOLLY: Yeah. See I've got the redacted and
3 the unredacted. And it's only one account.

4 THE COURT: Okay. Look, here's what I'll tell you.
5 I can't speak to the J.P. Morgan Chase subpoena. But I do
6 think it would help you folks if, at least with respect to the
7 Chase account, if Mr. Connolly can show Mr. Brosnick where on,
8 for example, that other account on the Chase subpoena it was
9 used to purchase Michelin tires, I would regard that as
10 relevant and subject to production.

11 But I do think that this could be pretty
12 expeditiously resolved applying the exact same process. So the
13 only thing that gets turned over is the redacted version of the
14 credit card statement and included only in there is Michelin or
15 Service, STTC purchases for the relevant time period. I think
16 that gives, the plaintiff is consistent exactly with what I had
17 already found with regard to the October subpoena to be
18 discoverable under the price cutting scheme alleged.

19 I think that very fairly accounts for something that
20 I'm very sensitive to, which is that Mr. Cohen's completely
21 unrelated uses of that card, whether it's to go to a ball game
22 or the movie theater, or to a grocery store, whatever. That's
23 not relevant and shouldn't be turned over. This accommodates
24 all of those concerns. And I think it's pretty reasonable.

25 MR. BROSニック: As to, if we're talking about one or

1 two cards, remember we're talking about seven years times 12
2 months worth of statements. And if we're talking about one or
3 two cards I would concede on that. We're talking about I think
4 something like 12 or 14 cards because we've seen numbers are
5 used by -- remember, this is now I guess technically off the
6 record because we're talking about --

7 THE COURT: I've ruled on the other one. They're not
8 going to, which is all the more reason why you folks should
9 figure out a way to work that out.

10 MR. BROSNICK: We're talking about Ms. Oliveri's
11 husband's card. We're talking about Ms. Oliveri's son's credit
12 card.

13 THE COURT: No, no.

14 MR. BROSNICK: We're talking about Felix, you know --

15 THE COURT: Mindonca (phonetic), Cruez, Siegal.

16 MR. BROSNICK: Right. We're talking about a lot of
17 people's cards, which is why I tried to limit it to Michelin
18 advantage and only to Mr. Cohen and Somet. I really -- Somet,
19 but I'm okay. I understand. Mr. Cohen also, but only as to --
20 the theory of the case as I understood it, I'm speaking as a
21 non-party so I don't know as well as they do, is that
22 supposedly this Michelin advantage card wasn't available to an
23 entity like Somet or someone like Mr. Cohen. And it's not like
24 I can get an American Airlines card even though I don't work at
25 American Airlines.

1 THE COURT: Uh-huh.

2 MR. BROSNICK: And if that's the case and they --
3 then okay, I see that. But as to other credit cards that were
4 used for Michelin purchases, especially if it's reflected in
5 our production already, it's another means of showing something
6 that's already been produced. We've produced the invoice for
7 that purchase from Service Tire.

8 And the 30(B)(6) witness will be able to testify if
9 that deposition is ordered, if the invoice was produced here,
10 it's marked on it and it's self evidence, why do you need, then
11 you need to go to that much more effort when we're already
12 going to be ridiculously burdened to find it was paid for by
13 this credit card not that one. With the except of the Michelin
14 advantage card, which I understand is a separate -- is --

15 THE COURT: Look, here's what I'm going to do. I
16 certainly understand that argument. I'm not ruling on the J.P.
17 Morgan subpoena. I do think your arguments though are well
18 taken. And obviously Mr. Connolly has the decision to make in
19 terms of whether he wants to work out a resolution along those
20 lines or, you know, go up to Boston and have this dispute
21 again.

22 So I would certainly encourage the parties with
23 regard to the J.P. Morgan Chase subpoena to work out some sort
24 of agreement along those lines or along similar lines. Because
25 if it is true that Inter City already has the invoices that

1 show the sales of those, I can understand to some degree the
2 purchasing information being contextually interesting. But it
3 becomes then a matter of degree. And if you're going to have
4 it with respect to Cohen's part, you already have, it sounds to
5 me like you're going to be able to introduce evidence regarding
6 the use of the Michelin advantage card, which your theory is
7 they never should have been able to use anyway because they
8 weren't a national account.

9 It's a question of whether you have enough or whether
10 you want to pursue more. But I do think that with regard with
11 the subpoena that is within my jurisdiction I think we have our
12 answer there.

13 It will be credit card statements for the
14 unidentified account and the Michelin advantage account
15 redacted to, Michelin advantage account of course to the extent
16 it's held by in the name of Yuhiel Cohen, Hali Cohen, or Somet,
17 redacted solely to reveal purchases of Michelin tires and/or
18 purchases from STTC for the relevant time period.

19 MR. BROSNIK: Just a clarification, Your Honor.
20 With respect only to this subpoena is Your Honor ordering, if a
21 card is held is not a Michelin advantage card, is that still
22 going to be -- what I proposed was to limit it to Michelin
23 advantage card or Yuhiel Cohen's card.

24 THE COURT: We're on the Chase subpoena, right?

25 MR. BROSNIK: Yes.

1 THE COURT: It's either Michelin advantage. It's
2 either the, the only accounts at issue are the one for which
3 the number on the subpoena is redacted. Right? And then any
4 Michelin advantage card held by either Yuhiel Cohen, Hali Cohn,
5 and/or Somet.

6 MR. BROSNICK: The trouble is, as I stand here today,
7 I've never seen an unredacted version of the subpoena. It
8 wasn't served on anyone at Somet. That, and I'm being a little
9 bit facetious, but that -- identify the account could be Ms.
10 Oliveri's husband's card. Or it could be some -- I have no
11 idea whose credit account that is, which is why I want an order
12 from this Court limiting it to only if it is an account of
13 Somet or Mr. Cohen.

14 THE COURT: Well let me come back to -- if the card
15 was used to purchase Michelin tires such that you're going to
16 be getting any responsive information, it's going to be limited
17 to those purchases anyway, in which case it's a credit card
18 that would have been used to purchase the tires. So it would
19 strike me as relevant.

20 But the question really more is before we send Somet
21 off to go run this down and review it and redact it, I do think
22 that we're entitled to particularly defense counsel is entitled
23 to at least some understanding of what account this is.

24 I'm working off of the assumption, which I assume is
25 a safe assumption, that this is an account that was used

1 separate and apart, A, that it's separate and apart from those
2 that were sought by the J.P. Morgan subpoena. And, B, that's
3 on there because the plaintiff has, or Inter City has evidence
4 that it was used to purchase Michelin brand tires.

5 MR. CONNOLLY: That is correct.

6 THE COURT: All right. What else do we know about
7 the account? Who was the account -- whose name was the
8 account? Do we know?

9 MR. CONNOLLY: Don't know.

10 THE COURT: All right. Here's what I'm going to do.
11 I'm going to, I'm going to table that particular account until
12 Thursday when we talk. By then Mr. Connolly you'll have gotten
13 that answer. You'll have given it to defense counsel. And
14 then we'll revisit that issue.

15 But I'll tell you now my inclination is if it is an
16 account that was used by Somet to purchase Michelin tires then
17 I do regard it as discoverable because it's imminently
18 consistent with Inter City's price cutting theory. And it's
19 not unduly burdensome because it's one other account number and
20 Mr. Connolly has modified that subpoena down to where
21 compliance with it could hardly be described as unduly
22 burdensome.

23 MR. BROSNICK: Your Honor, I just want to confirm my
24 understanding of that is, is all of the other records and bank
25 statements and all that, are we down to just the monthly --

1 THE COURT: The credit card statements.

2 MR. BROSNICK: Just the monthly credit card
3 statements.

4 THE COURT: Yes. Yeah. So we're going to revisit
5 that issue on Thursday. All right.

6 MR. CONNOLLY: We're speaking on Thursday or Friday?

7 THE COURT: Oh, Friday. I'm sorry. Friday. Friday,
8 Friday. I didn't mean to add to the confusion. But I'll tell
9 you now that's my inclination. If the card was used to
10 purchase Michelin tires I'm going to allow the production of
11 the redacted version of the statements.

12 MR. CONNOLLY: I appreciate the Court's ruling and my
13 only concern is that we can get the documentation to Mr.
14 Brosnick today as to where that number came from. And assuming
15 that we can make the factual connection to a Michelin tire
16 purchase, I'm reluctant to wait another week.

17 THE COURT: That's fine. Look, here's what you'll
18 do. You'll talk to him. I would hope at that point you folks
19 can work it out given the, my comments on the record. If you
20 can't you'll let me know on Tuesday.

21 MR. CONNOLLY: Okay.

22 THE COURT: Okay?

23 MR. BROSNICK: Unfortunately I'm going to ask Your
24 Honor if I can use your room for another call that I --

25 THE COURT: Of course. I think we're just about done

1 in any event for now.

2 MR. CONNOLLY: And so assuming we can work it out
3 then we'll notify Chase as to the limited contours of what the
4 Court has --

5 THE COURT: Exactly.

6 MR. CONNOLLY: Okay.

7 THE COURT: Exactly.

8 MR. BROSNICK: The last point I was going to make
9 other than renewing my request to quash all of these because my
10 client may want to --

11 THE COURT: Understand. I understand. It's denied
12 and you can set whatever appellate capacity you and your client
13 deem appropriate.

14 MR. BROSNICK: Is to say with respect to the
15 hopefully not 30(B)(6), the modified deposition and this latest
16 redacting of more credit card requests to seek the 45 cost
17 shifting as well on that.

18 THE COURT: You can see that I'm not ruling on that
19 right now. I don't need to rule on that right now. I have no
20 idea whether the deposition is going to go any way. In terms
21 of the redactions to the credit card statements we can address
22 that on Thursday. You folks talk. All right?

23 MR. CONNOLLY: Friday. Friday.

24 THE COURT: All right. You go, you can use the
25 conference room as long as you need.

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MR. BROSNIK: Thank you, Your Honor.

THE COURT: Mr. Brosnick. Mr. Connolly, safe trip back. Who ended up staying on the phone? Is there anything else we need to do on the record?

MR. BROSNIK: I don't believe so.

THE COURT: All right. We can go off the record.

(Conclusion of Proceedings at 2:21:07 p.m.)

CERTIFICATION

I, JANICE T. WARNER, Transcriptionist, do hereby certify that the 117 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

s/ Janice T. Warner

Signature of Approved Transcriber

January 19, 2015

Date

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